

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922

No. 84

THE MATTHEW ADDY COMPANY, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI FILED JULY 22, 1922.

CERTIORARI AND RETURN FILED NOVEMBER 4, 1922.

(29,044)



(29,044)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 494.

THE MATTHEW ADDY COMPANY, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT.

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The District Court of the United States, Southern District of Ohio, Western Division.

No. 1681.

INDICTMENT FOR —.

Act of August 10, 1917, especially sections 1, 2, 3, 4 and 25 thereof, and the Executive Order of the President of the United States, dated August 23, 1917. A true bill. G. V. Thompson, Foreman Grand Jury. Filed November 17, 1919.

SOUTHERN DISTRICT OF OHIO,
Western Division, ss:

Of the October Term, in the Year Nineteen Hundred and Nineteen.

First Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

The grand jurors for the United States of America, empaneled and sworn in the District Court of the United States for the Western Division of the Southern Judicial District of Ohio, at the October Term thereof, in the year nineteen hundred and nineteen, and inquiring for that division and district, upon their oaths present:

That by reason of the existence of a state of war, it was essential to the national security and defense, for the successful prosecution of the war, and for the support of the army and navy, to secure an adequate supply and distribution, and to facilitate the movement of certain things the said Act called "necessaries," which said things so denominated in said act as "necessaries" included fuel; and to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting the supply, distribution and movement of such "necessaries," including fuel; and to establish and maintain governmental control of such "necessaries," including fuel, during the war, the Congress of the United States (by an Act approved August 10, 1917, commonly known as "The National Defense Act" and especially Sections 1, 2, 3, 4 and 25 thereof authorized the President to make such regulations and to issue such orders as were essential to carry out the provisions of said act and whenever in his judgment the same was necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic and foreign, excepting that the regulations and prices so fixed and published should not be construed as invalidating

any contract in which prices were fixed, made in good faith, prior to the establishment and publication of such prices and regulations. That pursuant to the provisions of the Act above referred to and under its authority, the President of the United States on August 23, 1917, issued an Executive Order establishing and regulating the prices and margins of coal jobbers to apply to the intrastate, interstate and foreign commerce of the United States in which said Executive Order it was provided, among other things, that

"1. A coal jobber is defined as a person (or other agency) who purchases and resells coal to coal dealers or to consumers without physically handling it on, over, or through his own vehicle, dock, trestle or yard.

"2. For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of 15 cents per ton of 2,000 pounds, nor shall the combined gross margins of any number of jobbers who buy and sell a given shipment or shipments of bituminous coal exceed 15 cents per ton of 2,000 pounds."

That during the months of September, October and November, 1917, The Matthew Addy Company, was, and still is, a corporation organized and existing under the laws of the State of Ohio, and was, in the City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, engaged in and conducting business as a coal jobber as defined in said Executive Order; that continuously during the said months of September, October and November, 1917, a state of war existed between the United

States of America and the Imperial German Government and its allies, and the law, orders and regulations above referred to were in full force and effect.

The said grand jurors further present that on or about the tenth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from the Alexander Lumber Co., a corporation, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to-wit, about 50.75 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton and which said profit or margin of Twenty-five (25c.) Cents per ton was, and was well known by said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said the Alexander

Lumber Company, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Second Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said grand jurors further present that on or about to-wit, the seventh day of September, in the year nineteen hundred and seventeen, in said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Fred R. Kluckhohn, doing business in Naperville, Illinois, for a certain quantity of bituminous coal, to-wit, about 49.85 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton, and which said profit or margin of twenty-five cents per ton was and was well known by the said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Fred R. Kluckhohn, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Third Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts,

5 conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said grand jurors further present that on or about the seventh day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court said The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Fred R. Kluckhohn, doing business in Naperville, Illinois, for a certain quantity of bituminous coal, to-wit, about 42.7 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton, and which said profit or margin of Twenty-five (25c.) per ton was, and was well known by said The Matthew Addy Company to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Fred R. Kluckhohn, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Fourth Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

6 And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said grand jurors further present that on or about the eighth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said The Mat-

threw Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from The West Pullman Coal Company, a corporation doing business in Cook County, Illinois, for a certain quantity of bituminous coal, to-wit, about 47.5 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said the Matthew — oniously did ask, demand and receive from West Pullman Twenty-five (25c.) Cents per ton, and which said profit or margin of Twenty-five (25c.) cents per ton was, and was well known by said The Matthew Addy Company to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said The West Pullman Coal Company, made in good faith prior to said 23d day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

7 Fifth Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said grand jurors further present that on or about the seventh day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from The Wagner Manufacturing Company, a corporation doing business in Shelby County, Ohio, for a certain quantity of bituminous coal, to-wit, about 56.5 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton and which profit or margin of Twenty-five (25c.) Cents

per ton was, and was well known by said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said The Wagner Manufacturing Company, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed;

8 Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Sixth Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said grand jurors further present that on or about the seventh day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said The Matthew Addy Company, acting in its capacity as a coal jobber as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from The Wagner Manufacturing Company, a corporation doing business in Shelby County, Ohio, for a certain quantity of bituminous coal, to-wit, about 45.6 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton and which profit or margin of Twenty-five (25c.) Cents per ton was, and was well known by said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said The Wagner Manufacturing Company, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed;

9 Contrary to the form of the statute in such case made and pro-

vided, and against the peace and dignity of the United States of America.

Seventh Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said grand jurors further present that on or about the thirteenth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said The Matthew Addy Company, acting in its capacity as a coal jobber as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from The South End Supply Company, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to-wit, about 54.4 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton and which said profit or margin of Twenty-five Cents per ton was, and was well known by said The Matthew Addy Company, to be

in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said The South End Supply Company, made in good faith prior to said 23d day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Eighth Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and

the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated hereby by this reference as if fully written herein.

The said grand jurors further present that on or about the thirteenth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from The South End Supply Company, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to-wit, about 50.7 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy

Company, as such coal jobber, as aforesaid, of Twenty-five
11 (25c.) Cents per ton was and which said profit or margin of

Twenty-five (25c.) Cents per ton, was and was well known by said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grant jurors further present that said The Matthew Addy Company did not have any contract with said South End Supply Company, made in good faith prior to said 23d day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Ninth Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said grand jurors further present that on or about the twenty-sixth day of August nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand

and receive from Rice & Laub, doing business in Batavia, Clermont County, Ohio, for a certain quantity of bituminous coal, to-wit, about 6.85 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton, and which said profit or margin of twenty-five cents (25c.) cents per ton was, and was well known by said The Matthew Addy Company, to be in excess of the profit or gross margin of 15c. per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Rice & Laub, made in good faith prior to said 23d day of August, 1917, in which said contract the price for the purchase and sale of said coal was fixed;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Tenth Count.—Act of August 10, 1917, Especially Sections 1, 2, 4 and 25 Thereof, and the Executive order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated hereby by this reference as if fully written herein.

The said grand jurors further present that on or about the eighth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, unlawfully, knowingly and feloniously did ask, demand and receive from Rice & Laub, doing business in Batavia, Clermont County, Ohio, for a certain quantity of bituminous coal, to-wit, about 49.70 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton and which said profit or margin of twenty-five (25c.) cents per ton was, and was well known by said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000

pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Rice & Lamb, made in good faith prior to said 23d day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Eleventh Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated hereby by this reference as if fully written herein.

The said grand jurors further present that on or about the fourteenth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from The Boye & Emmes Machine Tool Company, a corporation, doing business in Cincinnati, Hamilton County, Ohio, for a certain quantity of bituminous coal, to-wit, about 59.15 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton and which said profit or margin of twenty-five (25c.) cents per ton was, and was well known by said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Boye & Emmes Machine Tool Company, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Twelfth Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated hereby by this reference as if fully written herein.

The said grand jurors further present that on or about the twelfth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from the Connersville Lumber Company, a corporation doing business in Connersville, Fayette County, Indiana, for a certain quantity of bituminous coal, to-wit, about 57.15 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton and which said profit or margin of twenty-five (25c.) cents per ton was, and was well known by said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Connersville Lumber Company, made in good faith prior to said 23d day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Thirteenth Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the Grand Jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof, beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page

16 hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said grand jurors further present that on or about the thirteenth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from the Consumers Coal & Supply Company, doing business in Elkhart, Elkhart County, Indiana, for a certain quantity of bituminous coal, to-wit, about 49.6 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and fifty (\$3.50) cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (\$.25) Cents per ton and which said profit or margin of Twenty-five (\$.25) Cents per ton was, and was well known by said The Matthew Addy Company to be, in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Consumers Coal & Supply Company, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Fourteenth Count.—Act of August 10, 1917, especially Sections 1, 2, 3 4 and 25 thereof, and the executive order of the President of the United States dated August 23, 1917.

And the Grand Jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof, beginning with the words

17 "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said grand jurors further present that on or about the thirteenth day of September, in the year nineteen hundred and seventeen, in the said city of Cincinnati, County of Hamilton, and State of Ohio, and within the jurisdiction of this Honorable Court, said The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from the Consumers Coal & Supply Company, doing business in Elkhart, Elkhart County, Indiana, for a certain

quantity of bituminous coal, to-wit, about 51 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton and which said profit or margin of Twenty-five (25c.) Cents per ton was, and was well known by said The Matthew Addy Company to be, in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said coal; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Consumers Coal Supply Company, made in good faith prior to said 23d day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Fifteenth Count.—Act of August 10, 1917, especially Sections 1, 2, 3, 4 and 25 thereof, and the executive order of the President of the United States dated August 23, 1917.

And the Grand Jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof, beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein with this reference as if fully written herein.

The said Grand Jurors further present that on or about the fifteenth day of September, in the year nineteen hundred and seven, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Frank M. Bell, doing business in Indianapolis, County of Marion, Indiana, for a certain quantity of bituminous coal to-wit, about 50.15 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber as aforesaid, of Twenty-five (25c.) Cents per ton and which said profit or margin of Twenty-five (25c.) Cents per ton was, and was well known by said The Matthew Addy Company to be, in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the

grand jurors further present that said The Matthew Addy Company did not have and contract with said Frank M. Bell, made in good faith prior to said 23d day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Sixteenth Count.—Act of August 10, 1917, especially Sections 1, 2, 3, 4 and 25 thereof, and the executive order of the President of the United States dated August 23, 1917.

19 And the Grand Jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof, beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated hereby by this reference as if fully written herein.

The said Grand Jurors further present that on or about the eleventh day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from the Whetstone Coal Company, doing business in the City of Cincinnati, Hamilton County, for a certain quantity of bituminous coal, to-wit, about 42.7 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber as aforesaid, of Twenty-five (25c.) Cents per ton and which said profit or margin of Twenty-five (25c.) Cents per ton was, and was well known by said The Matthew Addy Company to be, in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Whetstone Coal Company, made in good faith prior to said 23d day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

20 Seventeenth Count.—Act of August 10, 1917, especially Sections 1, 2, 3, 4 and 25 thereof, and the executive order of the President of the United States dated August 23, 1917.

And the Grand Jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof, beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said Grand Jurors further present that on or about the twenty-fourth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said The Matthew Addy Company, acting in its capacity as a coal jobber, aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from D. G. McFadden Grain Company, doing business in Ridgeville, Randolph County, Indiana, for a certain quantity of bituminous coal, to-wit, about 22.15 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber as aforesaid, of Twenty-five (25c.) Cents per ton and which said profit or margin of Twenty-five (25c.) Cents per ton was, and was well known by said The Matthew Addy Company to be, in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said D. G. McFadden Grain Company, made in good faith prior to said 24th day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Eighteenth Count.—Act of August 10, 1917, especially Sections 2, 3, 4, and 25 thereof, and the executive order of the President of the United States dated August 23, 1917.

And the Grand Jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof, beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated hereby by this reference as if fully written herein.

The said Grand Jurors further present that on or about the thirteenth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from the Kraft & Company, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to wit, about 52.5 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton and which said profit or margin of Twenty-five (25c.) Cents per ton was, and was well known by said The Matthew Addy Company to be, in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Kraft & Company, made in good faith prior to said 23rd day of August, 1917, in which said

22 contract, the price for the purchase and sale of said coal was fixed;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Nineteenth Count.—Act of August 10, 1917, especially Section 1, 2, 3, 4 and 25 thereof and the executive order of the President of the United States dated August 23, 1917.

And the Grand Jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof, beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated hereby by this reference as if fully written herein.

The said Grand Jurors further present that on or about the thirteenth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from the Kraft & Company, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to wit, about 50.6 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of

Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton and which said profit or margin of Twenty-five (25c.) Cents per ton was, and was well known by said The Matthew Addy Company to be, in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Kraft & Company, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Twentieth Count.—Act of August 10, 1917, especially Sections 1, 2, 3, 4 and 25 thereof and the executive order of the President of the United States dated August 23, 1917.

And the Grand Jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof, beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said Grand Jurors further present that on or about the tenth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Frey Brothers, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to wit, about 50.30 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton and which said profit or margin of Twenty-five (25c.) Cents per ton was, and was well known by said The Matthew Addy Company to be, in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Frey Brothers,

made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Twenty-first Count.—Act of August 10, 1917, especially Section- 1, 2, 3, 4 and 25 thereof and the executive order of the President of the United States dated August 23, 1917.

And the Grand Jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof, beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders, and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said Grand Jurors further present that on or about the tenth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Frey Brothers, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to wit, about 42.35 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton and which said profit or margin of Twenty-five (25c.) Cents per ton was, and

25 was well known by said The Matthew Addy Company to be, in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Frey Brothers, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Twenty-second Count.—Act of August 10, 1917, especially Section- 1, 2, 3, 4 and 25 thereof and the executive order of the President of the United States dated August 23, 1917.

And the Grand Jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and

things as set forth in the first count hereof, beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated hereby by this reference as if fully written herein.

The said Grand Jurors further present that on or about the tenth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Frey Brothers, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to wit, about 51.25 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three

Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton and which said profit or margin of Twenty-five (25c.) Cents per ton was, and was well known by said The Matthew Addy Company to be, in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Frey Brothers, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Twenty-third Count.—Act of August 10, 1917, especially Section- 1, 2, 3, 4 and 25 thereof and the executive order of the President of the United States dated August 23, 1917.

And the Grand Jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof, beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated hereby by this reference as if fully written herein.

The said Grand Jurors further present that on or about the tenth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid,

said, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Frey Brothers, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to wit, about 50 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of

27 Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton and which said profit or margin of Twenty-five (25c.) Cents per ton was, and was well known by said The Matthew Addy Company to be, in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Frey Brothers, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. Stuart R. Bolin, United States Attorney, S. D. O.

MOTION TO QUASH INDICTMENT.

[Filed December 26, 1919.]

Comes now defendant, The Matthew Addy Company, by its attorney, and moves the court to quash the indictment and each and every one of the several counts contained therein, because of the following defects apparent upon the face of the record.

1. Said indictment and each of its several counts is insufficient in law and fact.

2. Said indictment and each of its several counts charges 28 in each count several separate and distinct alleged offenses and is bad for duplicity.

3. Said indictment and each of its several counts charges no indictable offense under the laws of the United States.

4. That the averments in said indictment as to the form of same and the manner in which said offense is charged, are so vague, indefinite, uncertain, argumentative and misleading that the defendant is not properly informed of the charge against him or what he shall meet at the trial and can not prepare his defense.

5. That the indictment is not in the form of nor does it conform to the Act of Congress alleged to have been violated.

6. Other defects apparent upon the record. Nelson B. Cramer, Attorney for Defendant, The Matthew Addy Company.

OPINION ON MOTION.

[Filed February 26, 1920.]

Peck, District Judge:

On motion to quash the indictment.

Identical questions are presented in each case.

The indictment is not multifarious. The offense is charged by the allegations of fact, not by the references to laws. The latter are surplusage.

The indictment is sufficient. The word "may" in the last clause of the first paragraph of Section 25 of the National Defense (Lever) Act (40 Stat., 276) is permissive. The President is thereby empowered, not required, to exercise his authority to regulate the prices and production of coal through the Federal Trade Commission in each instance. This is the ordinary significance of the word. *United States vs. Lexington Mill Co.*, 232 U. S., 399. And that it was so intended is clear from the context. It may be noted that the third paragraph vests in the President a similar optional discretion to act through the Commission or otherwise.

The authority of the Commission under the thirteenth paragraph of the section is to fix local prices only after direction by the President to make the investigation authorized by the eleventh paragraph. The grant of powers to the Commission is contingent and does not become effective until that direction is given. Such grant does not, therefore, require the construction of the first paragraph, to the effect that the President can act only through the Commission, for which the defendant contends. *United States vs. Pennsylvania Central Coal Co.*, 256 Fed., 703.

For the Government: Stuart R. Bolin, United States Attorney; Allen C. Roudebush, Assistant United States Attorney. For the Defendants: Nelson B. Cramer, Julius R. Samuels.

ORDER OVERRULING DEFENDANT'S MOTION.

[Filed June 4, 1920.]

This cause coming on to be heard upon defendant's motion to quash the indictment was argued by counsel and submitted to the court, upon consideration whereof the court found that said motion is not well taken and overruled the same on February 26, 1920, to which defendant excepts. And it is ordered that this entry be made as of February 26, 1920. Peck, J.

DEMURRER TO INDICTMENT.

[Filed February 28, 1920.]

Comes now defendant, The Matthew Addy Company, by its attorney and demurs to the indictment and each of its several counts contained therein for the following reasons, to-wit:

1. That the Act of Congress and the rules, regulations, promulgations and publications of the President and the United States Fuel Administrator, are indefinite, uncertain, and misleading and do not clearly describe an offense.

2. The Act of Congress and the rulings, regulations, etc., are unconstitutional for the following reasons, to-wit:

a. They violate the fifth amendment to the Constitution of the United States, in that defendant is deprived of its property without due process of law.

b. They violate the sixth amendment to the Constitution of the United States, in that defendant is not informed of the nature of the accusation.

c. They violate the tenth amendment to the Constitution of the United States in that they interfere with the rights of the respective states, as to regulation of industries within those states.

d. The Act of Congress of August 10, 1917, violates Section 1, of Article 1, Section 1 of Article 2, and Section 1 of Article 3 of the Constitution of the United States in that it delegates legislative and judicial powers to the President of the United States, to the United States Fuel Administrator appointed by the President, and the Federal Trade Commission.

e. The Act of Congress violates clause 1 of Section 8 of Article 1, and clause 11 of Section 8, of Article 1 of the Constitution of the United States in that, it is an abuse of the power given to Congress to provide for the national security and defense.

f. The ruling of the President of the United States under date of October 6th, 1917, violates clause 3 of Section 9 of Article 1 of the Constitution of the United States in that it is an *ex post facto* law. Nelson B. Cramer, Attorney for Defendant, The Matthew Addy Company.

OPINION ON DEMURRER.

[Filed May 29, 1920.]

PECK, *District Judge*:

On demurrer to indictment.

The principal question raised is whether Section 25 of the National Defense (Lever) Act, authorizing the President to fix the price of coal during the continuance of the war is constitutional as depriving of property without due process of law.

While the war created no new powers in Congress it undoubtedly required the exercise of powers latent in times of peace. *McKinley vs. U. S.*, 249 U. S., 397. The right to regulate business, including the fixing of prices for essential commodities, in furtherance of a constitutional power of the United States, exists when the business sought to be regulated is one in which the public has an interest beyond that of the persons who participate in the individual transactions therein. *Munn vs. Illinois*, 94 U. S., 133. Businesses which are purely private in times of peace may become matters of vital public concern in times of war. The late war was a

marshaling not only of the man-power of the nations engaged, but of their total resources and economic strength. The production and distribution of coal, the chief source of industrial energy, was a business in which the public had a vital interest over and above that of the individuals engaged in the particular transactions; therefore, it was a business which Congress had the right to regulate.

It is true that the Act afforded no opportunity for judicial review of the reasonableness of the prices fixed by the President, and this has been determined, under ordinary circumstances, with reference to railroad and other rates, to be want of due process of law. *Chicago, Milwaukee & St. Paul Ry. vs. Minnesota*, 134 U. S., 418; *Minnesota Rate Cases*, 230 U. S., 352-434; *Oklahoma Operating Co. vs. Love*, — U. S., —, decided March 22, 1920; *Holter Hardware Co. vs. Boyle*, 263 Fed., 134.

But due process of law is not to be tested by form of procedure merely (Cooley, *Const. Lim.* 7th Ed., p. 506) and varies with the subject-matter and necessities of the situation. Public danger warrants the substitution of executive process for judicial process. *Moyer vs. Peabody*, 212 U. S., 78. During the war, when the marshaling of the industrial powers of the nation was imperative, prompt action was demanded and extended investigations such as are necessary to judicial review of the economic orders essential to the prosecution of the war were impractical and impossible. And, under the circumstances then existing, the fixing of prices in public industries necessary for the prosecution of the war, by the President, under the authority of the Act of Congress, was not the deprivation of due process of law; nor was the reposing of such power in the President unconstitutional as a delegation of either legislative or judicial power. *U. S. vs. Penn. Central Coal Co.*, 256 Fed., 703.

Demurrer overruled.

For the Government: James R. Clark, Allen C. Roudebush; for Defendants: Nelson B. Cramer, Julius R. Samuels.

3 ORDER OVERRULING DEFENDANT'S DEMURRER TO THE INDICTMENT.

[Filed June 4, 1920.]

This cause coming on to be heard upon the demurrer of defendant was argued by counsel and submitted to the court, upon consideration whereof the court found that said demurrer is not well taken and overruled the same on May 29, 1920, to which defendant excepted. And it is ordered that this entry be made as of May 29, 1920. Peck, J.

VERDICT.

[Filed June 2, 1920.]

We, the Jury, herein do find the defendant, The Matthew Addy Co., guilty in manner and form as charged in the 2, 5, 7, 9, 10, 11,

12, 13, 15, 16, 17, 18, 20, counts of said indictment, and not guilty as charged in the remaining counts thereof, 1 and 4. Signed, J. C. Rodgers, Foreman.

MOTION FOR A NEW TRIAL.

[Filed June 5, 1920.]

Defendant moves the court to set aside the verdict and discharge defendant, or grant a new trial, upon the following grounds:

1. The verdict against him on each count of the indictment on which he has been found guilty, to-wit, counts 2, 5, 7, 9, 10, 11, 12, 13, 15, 16, 17, 18 and 20, is not sustained evidence and is contrary to law and the evidence.

2. The court erred in refusing to give to the jury each of the charges requested by the defendant and refused.

3. The court erred in its general charge to the jury.

4. The court erred in excluding evidence offered by the defendant.

5. The court erred in admitting evidence on behalf of the Government over objection of the defendant.

6. The court erred in overruling defendant's motion at the close of the Government's evidence to dismiss the cause and discharge defendant.

7. The court erred in overruling defendant's motion at the close of all the evidence to dismiss the cause and discharge defendant.

8. Other errors of law occurring at the trial, and excepted to by defendants. Nelson B. Cramer, Joseph S. Graydon, Julius R. Samuels, Attorneys for Defendant.

RULING ON MOTION FOR NEW TRIAL.

[Filed June 23, 1920.]

PECK, District Judge:

On motion for new trial.

It is urged that the court gave retroactive effect to the President's order of August 23, 1917, fixing the jobber's commission, in that, whereas the order prescribes that for the buying and selling of bituminous coal a jobber shall not add more than fifteen cents to his purchase price, the defendant was convicted for having, after the promulgation of that order, added a margin in excess of that prescribed with respect to coal which it had contracted for prior to the date of the order. The argument presented is that the defendant had a vested interest in its contract of purchase, and that the regulation is not to be so construed as to effect the same unless such clearly appears to be the intention. But does it not clearly so appear?

The preamble of the Lever Act declares that by reason of a state of war, it is essential for the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable

distribution, and to facilitate the movement, and to prevent scarcity, manipulation and hoarding of coal, and injurious speculation, manipulation and private controls affecting such supply, distribution and movement, and to establish and maintain, during the war, control of coal, among other necessities therein enumerated. The objects to be accomplished were of immediate urgency. It was not a permanent policy that was being instituted, but prompt and extraordinary action for the national defense. To effect the same the President was given authority, by Section 25, to fix the price of coal wherever and whenever sold.

The act took effect upon August 10, 1917, and eleven days later the President promulgated a general scale of prices at the mines, for bituminous coal, and almost immediately thereafter, August 23, issued a further proclamation fixing the prices for anthracite coal, and, as a part thereof, promulgated the regulation in question relating to jobbers' margins. The order stated that the margins therein referred to should be in force pending further investigation.

It is well known, and if it were not so it is recognized in certain orders of the Fuel Administration (see order November 8, 1917, General Orders, p. 448), that the coal mine output was largely contracted to be sold in advance. Coal not under contract was spoken of as "free coal." (Order of October 6, 1917, Id., 445.) By the 25th section of the act existing contracts for future delivery were saved. The supply of coal was, therefore, to a large extent, contracted for by jobbers, and in their hands, so to speak, at the time the act was passed. Unless jobbers' margins with reference to then existing contracts were regulated, it remained open to the jobber to demand what he could get for his coal, and to thus carry on the injurious speculation, manipulation and private control of the supply which the act was designed to prevent. Reading together the Act of Congress and the presidential orders designed to carry out the purpose thereof, it does not seem open to doubt that it was the intention of the President to control and prevent speculation in the commodity so far as possible, not merely to fix prices for mine operators and permit those jobbers who held contracts for the mine output to be free from all restriction in the disposition of the same.

As to the vested interest of the jobber in his contract, it was not greater than that of the mine-owner in his coal, mine and equipment. The construction of the order contended for would discriminate against the mine-owner and in favor of the jobber. It would be, in short, to say that the President had regulated the mine operator's price but left the jobber without limit as to price or profit on coal held by contract. Such a construction would violate the obvious purpose of the act.

Should the indictment have averred that the margin charged was for the buying and selling of the coal? The indictment alleges that the defendant, in its capacity as a coal jobber (viz., one who bought and sold), asked, demanded and received a price *f. o. b.* the mines producing said coal (which, of itself, would preclude the possibility of the defendant's having paid transportation charges), a price per ton

which included a profit or gross margin to it, as such coal jobber (in other words, a "jobber's commission"—see orders of October 6, 1917), of twenty-five cents per ton, which profit or margin was, and was well known to the defendant to be, in excess of that permitted by the regulation, which regulation defining a jobber's margin is set forth in the indictment. The phrase "profit or gross margin to it as a coal jobber" may be fairly assumed to be synonymous with "jobber's commission" as used in the subsequent orders of the Fuel Administration, and by the regulation would be defined as that sum allowable to a jobber for the buying and selling of coal.

It would, therefore, seem that the indictment charges a violation of the regulation (which violation is, by the 25th section of the Lever Act, made an offense), in words which would render it certain, their truth being found, that the defendant is guilty, and which informed the defendant definitely of the accusation to be met; and, judgment having been rendered thereon would suffice to protect the defendant against another indictment for the same acts. More is not required.

Motion overruled.

For the Government: Allen C. Roudebush, Assistant United States Attorney; for the Defendants: Nelson B. Cramer, Julius R. Samuels, Joseph S. Graydon.

ENTRY OVERRULING MOTION FOR NEW TRIAL.

[Filed June 23, 1920.]

This case coming on to be heard upon a motion of the defendant for new trial, and the court being fully advised in the premises, finds that said motion is not well taken.

Therefore, it is hereby ordered, adjudged and decreed, That said motion be overruled, to all of which said defendant excepts. Peck, Judge United States District Court, S. D. O.

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SENTENCE.

[Entered June 24, 1920.]

This day came the District Attorney on behalf of the United States and the defendant, the Matthew Addy Company, being represented in court by its president, James A. Green and by counsel.

Thereupon, the District Attorney moving for sentence, the court pronounced the following sentence to-wit, that the said defendant pay a fine of One Thousand (\$1,000.00) Dollars and the costs of this prosecution to be taxed.

It is further ordered by the court that the said sentence be stayed pending the allowance and disposition of a writ of error herein, upon the defendant giving bond in the sum of Two Thousand, Five Hundred Dollars with sureties to be approved by the clerk of this court.

MOTION IN ARREST OF JUDGMENT.

[Filed June 23, 1920.]

The defendant, The Matthew Addy Company, moves the court to arrest judgment as to each of the counts of the indictment upon which it has been found guilty, to-wit, counts 2, 5, 7, 9, 10, 11, 12, 13, 15, 16, 17, 18 and 20, upon the following grounds:

1. The matters and things set forth and charged do not constitute an offense against the laws of the United States.
2. The provisions of the Act of Congress of August 10, 1917, 40 Stat., 276, known as the National Defense (Lever) Act, and especially Sections 1, 2, 3, 4 and 25 thereof, and the promulgation of the order of the President issued August 23, 1917, and especially Sections 1 and 2 thereof, are, as construed and applied by the judgment of the court, unconstitutional and void, in that they attempt to create offenses and impose penalties repugnant to the Constitution of the United States, especially Section 1 of Article 1, Section 1 of Article 2 and Section 1 of Article 3; and to the provisions of the 5th amendment that no person shall be deprived of life, liberty or property without due process *fo* law; and to the provision of the 6th amendment that in all criminal cases the accused is entitled to be informed of the nature and cause of the accusation against him; and to the 10th amendment reserving to the States, or to the people thereof, powers not delegated to the United States; and to Clause 1 of Section 8 of Article 1, and Clause 11 of Section 8 of Article 1 of the Constitution of the United States.
3. The averments of each of said counts are too general, vague, uncertain and indefinite to state an offense, or to inform defendant of the nature and cause of the accusation or to apprise him, with such reasonable certainty of the offense with which he is charged, and which he may be expected to meet on a trial, as to enable him to make his defense.
4. Each of said counts undertakes to charge separate and distinct offenses, and is bad for duplicity.
5. Upon certain of said counts, conviction was had for acts committed outside the jurisdiction of the court. Nelson B. Cramer, Joseph S. Graydon, Julius R. Samuels, Attorneys for Defendant.

ENTRY OVERRULING MOTION IN ARREST OF JUDGMENT.

[Filed June 23, 1920.]

This case coming on to be heard upon a motion in arrest of judgment filed by the defendant, and the court being fully advised in the premises, finds said motion not to be well taken.

Therefore, it is hereby ordered, adjudged and decreed, That said motion be overruled, to all of which said defendant excepts. Peck, Judge United States District Court, S. D. O.

BOND.

[Filed June 26, 1920.]

United States District Court, Southern District of Ohio, Western Division, ss.

That the Matthew Addy Company, as principal, and James A. Green and Robert M. Green as sureties, jointly and severally acknowledge ourselves indebted to the United States of America in the sum of \$2,500, lawful money of the United States of America, to be levied on our and each of our goods, chattels, lands and tenements upon this condition:

Whereas, the District Court of the United States for the Southern District of Ohio, Western Division, has lately, in a suit depending in said court, between the United States of America and said The

Matthew Addy Company imposed sentence upon said The
41 Matthew Addy Company of a fine of \$1,000 and the costs of said suit, and has ordered that pending an application for a writ of error, prosecution of appeal, or other proceedings to reverse said judgment, execution shall be stayed upon the giving of a recognizance with sureties in the sum of \$2,500.

Now, the condition of the above obligation is such that if said The Matthew Addy Company shall prosecute such proceedings in error or appeal to effect, and answer all damages and costs if it fail to make its said pleas and proceedings good, then the above obligation to be void, else to remain in full force and virtue. The Matthew Addy Company, B. N. Ford, Vice President. James A. Green. Robert M. Green. Approved by B. E. Dilley, Clerk.

BILL OF EXCEPTIONS.

Trial before Hon. John W. Peck and a jury, at Cincinnati, beginning June 1, 1920.

Appearances: Allen C. Roudebush, Assistant U. S. Attorney, for the Government; Nelson B. Cramer, Julius R. Samuels and Joseph S. Graydon for defendant.

Tuesday Afternoon, June 1, 1920.

Court met pursuant to adjournment, all counsel being present as noted.

The Court: Which one of these cases is to be tried first, Mr. District Attorney?

42 Mr. Roudebush: Matthew Addy case.

The Court: United States of America vs. The Matthew Addy Company. Is defendant ready?

Mr. Cramer: I understood the cases were to be tried together.

Mr. Roudebush: That is satisfactory.

The Court: That could only be done, of course, by agreement of counsel.

Mr. Roudebush: I agree to it, Your Honor.

Motion overruled.

Mr. Cramer: It is agreeable, yes.

The Court: That is, both cases may be tried upon the same evidence at the same time, simultaneously?

Mr. Cramer: In so far as the indictments apply against each one. There are twenty-three counts against the company and eleven against the individual.

The Court: Of course, separate verdicts will be rendered in each case, so they will be separate simultaneous trials.

Thereupon, after a jury had been duly impaneled and sworn, the trial proceeded as follows:

The Court: The Government may state its case.

Mr. Roudebush: If Your Honor please, and gentlemen of the jury, the Government expects the evidence to show that The Matthew Addy Company, a corporation doing business in this city, was a jobber and handled this coal in question as a jobber, without physically handling same; that The Matthew Addy Company, on or about, or, in fact, on the 31st day of July, 1917, made a contract with the Bluefield Coal & Coke Company, of Bluefield, West Virginia, in which they purchased coal at three dollars and twenty-five cents per ton at the mines; that this company, without physically handling this coal, sold this coal to different parties set forth in the twenty-three counts, part to each of twenty-three different persons. The defendants have offered and agreed that they would admit and stipulate that the coal was sold to these parties as set forth in the indictment, at the charge, which is all the same in each one, of three dollars and fifty cents a ton, and that they had no contract to sell to these twenty-three different parties——

Mr. Cramer: If the court pleases, we are admitting the naked sale of this coal at three dollars and twenty-five cents—three dollars and a half, not any other——

Mr. Roudebush: Mr. Cramer, I asked you just before the jury was sworn——

Mr. Cramer: If the court please, if there is any controversy I would ask that the jury be dismissed, and not have any controversy as to veracity between counsel in their presence.

The Court: Is it admitted that the coal set forth in the several counts of both indictments was sold at the prices and in the quantities and on the dates therein set forth?

Mr. Cramer: That is all we have admitted.

The Court: That is admitted?

Mr. Roudebush: That is what I stated.

The Court: That is the extent of the admission, as I understand it.

Mr. Roudebush: And that the Matthew Addy Company is a corporation?

Mr. Cramer: Certainly.

Mr. Roudebush: Your Honor, do they admit that the coal was sold on the dates that we set forth in the indictments to the parties and at the price?

The Court: That is the admission in each case, in each of the several counts. I am correct, am I not, Mr. Cramer?

Mr. Cramer: Yes, sir.

Mr. Roudebush: Gentlemen of the jury, the evidence will show, as I started to say, that this coal was purchased on the 31st day of July, of the Bluefield Coal & Coke Company of Bluefield, West Virginia, for three dollars and twenty-five cents a ton; that it was sold to the different parties set forth at three dollars and a half a ton, being a commission of fifty cents a ton——

Mr. Cramer: Twenty-five cents.

Mr. Roudebush: Twenty-five cents a ton.

A Juror: What do you mean?

Mr. Roudebush: A profit of twenty-five cents a ton, that they charged a commission of twenty-five cents a ton when the regulation said they could only charge fifteen cents.

Mr. Graydon: Now, if Your Honor please, that is not a correct statement of any regulation that could be introduced in evidence. I don't know how to meet the effort of the Government to state what everybody knows they can't prove. If that statement is to stand before the jury I would like the District Attorney——

The Court: What is the statement you object to?

Mr. Graydon: He says he has some regulation which says they could not charge a commission of more than twenty-five cents.

Mr. Roudebush: Gross margin.

44 Mr. Graydon: No such regulation can be produced. The regulation which is relied on is set forth in the indictment.

The Court: It is set forth in the indictment.

Mr. Graydon: Then why state it?

The Court: The defendants may state the defense.

Mr. Graydon: If Your Honor please, I would like Your Honor to require the Government to state the offense which is proposed to be proven, with the possibility that if he fails to state any offense we won't have to state any defense.

The Court: Well, for the sake of exactness, will you please read that Presidential order to which you refer, Mr. Roudebush?

Mr. Roudebush: The part of it as set forth in the indictment I think covers the point.

(Reading:) "A coal jobber is defined as a person (or other agency) who purchases and resells coal to coal dealers or consumers without physically handling it on, over, or through his own vehicle, dock, trestle or yard.

"For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of 15 cents per ton of 2,000 pounds, nor shall the combined gross margin of any number of jobbers who buy and sell a given shipment or shipments of bituminous coal exceed 15 cents per ton of 2,000 pounds."

Mr. Graydon: Now, Your Honor, the District Attorney has stated

that the regulation is, and I would now like to have him required to state what he proposes to prove as a violation of the regulation.

The Court: I believe he stated that the coal was purchased at \$3.25 a ton, and proposed to show it was sold at \$3.50 a ton, as I understand it, and that, coupled with the allegation that he makes that the defendants were then and there coal jobbers, is the statement upon which the Government relies. Let the defense be stated.

Mr. Cramer: If the court please—

The Court: Mr. Cramer.

Mr. Cramer: —and gentlemen of the jury, the defendants in this case have been indicted under what is known as the "profiteering" law, the Lever Act, passed by Congress August 10, 1917. The Government has just stated its case, that we have violated the President's promulgation or order of August 23, which states that the gross margin allowed in any single transaction shall be fifteen cents. The indictment doesn't agree with the Government's statement of what it expects to prove. The indictment states that Benjamin N. Ford—referring to Mr. Ford's indictment and not the corporation—acting in his capacity as vice-president, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully and knowingly and feloniously did ask and demand and receive from Frey Brothers, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to-wit, about 50.3 tons of 2,000 pounds each of Pottawatomie Run-of-Mine coal, a price of \$3.50 per ton, f. o. b. the mines producing said coal, which said price of \$3.50 per ton included a profit or gross margin to it.

Now Mr. Roudebush has not accused, in his preliminary statement of the case, that we have made a profit.

Mr. Graydon: Yes, he did say that.

Mr. Cramer: I mean in reading the promulgation of the President. In his preliminary statement he said we are charged in this indictment with having made a gross profit—a profit, not gross or net or otherwise, of more than fifteen cents a ton—as such coal jobber as aforesaid, of twenty-five cents a ton—included a profit or gross margin, referring again to the exact phraseology of the indictment—that \$3.50 a ton included a profit or gross margin to it, the said The Matthew Addy Company, as such coal jobbers as aforesaid, of twenty-five cents per ton, and which said profit or margin of twenty-five cents per ton was, and was well-known to said Benjamin N. Ford, vice-president, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of profit of fifteen cents per ton of 2,000 pounds permitted by law, executive order or regulations above referred to.

The Lever Act is the profiteering law, and the State has stated they expect to prove we made a profit in excess of the fifteen cents allowed by the promulgation of August 23rd.

We expect to prove that this coal—and as has been stated by Mr. Roudebush in his opening statement—was purchased by a contract dated July 31, 1917, which was more than a month prior to the enactment of the Lever Act, which was enacted by Congress under

date of August 10, 1917. That act specifically exempted from its control or influence any contract—it didn't say contract of
46 purchase and contract of sale; it says "any contract." And I wish to refer to the act.

Mr. Roudebush: Your Honor, I object to this line of opening statement, because it is a question of interpretation of the law, and I don't think it is proper because the interpretation of the law upon which this indictment is based is that it must be both sold—must be a contract for both sale and purchase. It seems to me we ought to know where we are on that, to start with.

The Court: Of course, the statement to the jury is a statement of the facts that you expect to prove. However, if counsel desire to call the court's attention to any matters of law to be considered they may do so.

Mr. Cramer: That is absolutely so. I am repeating, as I thought, what Mr. Roudebush had just referred to as proof for the admission that this coal was purchased under contract dated July 31, 1917.

The Court: I am inclined to think the consideration of the law should be—

Mr. Cramer: I will try and refrain from a consideration of the law.

The Court: Very well.

Mr. Cramer: We expect to prove that at the time of the purchase of this coal under date of July 31, 1917, there was a quasi-official agreement between the Government of the United States, as represented by Secretary of Interior Lane—

Mr. Roudebush: Your Honor, I object to this.

The Court: Well, counsel may state what he expects to prove. I can't pass on it all in advance.

Mr. Cramer: —and at that time, and under that agreement, which is known as the Lane-Peabody Agreement, the commission, the gross commision of jobbers of coal was fixed at twenty-five cents per ton: that the memorandum of the purchase of this coal under date of July 31, 1917, was by Mr. Ford, as manager of the department of coal sales and purchases, was sent to the different branch offices of The Matthew Addy Company, and to the different salesmen selling coal for The Matthew Addy Company, with a notation that under the Lane-Peabody Agreement we can add twenty-five cents a ton to the purchase price.

We expect to show that a part of the coal purchased from the Bluefield Coal & Coke Company was sold between the date of its purchase and August 23rd, at which time the President fixed the
47 commission allowed to coal jobbers, and that after that time the balance of this coal was sold.

The third defense or point that we will prove is that the fifteen cents allowed by the President under his proclamation of August 23rd would not have equalled the selling price to the Matthew Addy Company—

Mr. Roudebush: I object.

Mr. Cramer: —the costs of the sales—

The Court: Counsel may state his defense. The questions of admissibility of evidence will be considered later, Mr. Roudebush.

Mr. Cramer: If the court please, I would like to answer the Government's argument on that.

The Court: You may proceed with your statement of the facts, Mr. Cramer.

Mr. Cramer: As I have stated, we expect to prove that the fifteen cents allowed under the President's promulgation of August 23, 1917, was not a sufficient amount to cover the actual cost of selling the coal purchased under date of July 31st, by which I mean that the sale of this coal was controlled by the Lever Act and we had actually added fifteen cents to the purchase price of that coal that there would have been an actual monetary loss sustained by The Matthew Addy Company.

That is sufficient.

The Court: The Government may call its evidence.

Mr. Cramer: Mr. Roudebush, do you want a stipulation?

Mr. Roudebush: Yes.

The Court: You might cover this matter of sales by a stipulation start with.

(Thereupon counsel for the government confers with counsel for the defendants.)

Mr. Graydon: If there is any misunderstanding about what it is I suppose the Government can produce its case, if counsel can't agree what their verbal understanding was.

The Court: Does the stipulation cover the place of sale?

Mr. Roudebush: I think so, Your Honor.

(Thereupon counsel for both sides again confer.)

Mr. Graydon: I don't think the Government will contend that any counsel on this side ever agreed to admit anything that was not alleged in the indictment. If I am mistaken about that I would like to be advised about it.

Thereupon the following stipulation was entered into between counsel for both sides:

It is hereby stipulated between counsel for the Government and the defendants that the coal in the several counts of each indictment was sold to the parties mentioned in each count, respectively, at the date and price and in the amount set forth in each count of said indictments, and that The Matthew Addy Company is a corporation organized under the laws of the State of Ohio.

The Court: Now, the stipulation does not cover the place of sale, do I understand?

Mr. Graydon: No.

The Court: Does the indictment show it was done in this district in each case?

Mr. Roudebush: Yes, Your Honor, in the City of Cincinnati,

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do so.

Mr. Cramer: That is absolutely so. I am repeating, as I thought
what Mr. Roudebush had just referred to as proof for the admission
that this coal was purchased under contract dated July 31, 1917.

The Court: I am inclined to think the consideration of the law
should be—

Mr. Cramer: I will try and refrain from a consideration of the
law.

The Court: Very well.

Mr. Cramer: We expect to prove that at the time of the purchase
of this coal under date of July 31, 1917, there was a quasi-official
agreement between the Government of the United States, as represented
by Secretary of Interior Lane—

Mr. Roudebush: Your Honor, I object to this.

The Court: Well, counsel may state what he expects to prove. I
can't pass on it all in advance.

Mr. Cramer: —and at that time, and under that agreement, which
is known as the Lane-Peabody Agreement, the commission, the gross
commission of jobbers of coal was fixed at twenty-five cents per ton;
that the memorandum of the purchase of this coal under date of July
31, 1917, was by Mr. Ford, as manager of the department of coal
sales and purchases, was sent to the different branch offices of The
Matthew Addy Company, and to the different salesmen selling coal
for The Matthew Addy Company, with a notation that under the
Lane-Peabody Agreement we can add twenty-five cents a ton to the
purchase price.

We expect to show that a part of the coal purchased from the
Bluefield Coal & Coke Company was sold between the date of its purchase
and August 23rd, at which time the President fixed the
47 commission allowed to coal jobbers, and that after that time
the balance of this coal was sold.

The third defense or point that we will prove is that the fifteen
cents allowed by the President under his proclamation of August
23rd would not have equalled the selling price to the Matthew Addy
Company—

Mr. Roudebush: I object.

Mr. Cramer: —the costs of the sales—

The Court: Counsel may state his defense. The questions of admissibility of evidence will be considered later, Mr. Roudebush.

Mr. Cramer: If the court please, I would like to answer the Government's argument on that.

The Court: You may proceed with your statement of the facts, Mr. Cramer.

Mr. Cramer: As I have stated, we expect to prove that the fifteen cents allowed under the President's promulgation of August 23, 1917, was not a sufficient amount to cover the actual cost of selling the coal purchased under date of July 31st, by which I mean that if the sale of this coal was controlled by the Lever Act and we had only added fifteen cents to the purchase price of that coal that there would have been an actual monetary loss sustained by The Matthew Addy Company.

That is sufficient.

The Court: The Government may call its evidence.

Mr. Cramer: Mr. Roudebush, do you want a stipulation?

Mr. Roudebush: Yes.

The Court: You might cover this matter of sales by a stipulation to start with.

(Thereupon counsel for the government confers with counsel for defendants.)

Mr. Graydon: If there is any misunderstanding about what it is I suppose the Government can produce its case, if counsel can't agree what their verbal understanding was.

The Court: Does the stipulation cover the place of sale?

Mr. Roudebush: I think so, Your Honor.

(Thereupon counsel for both sides again confer.)

Mr. Graydon: I don't think the Government will contend that my counsel on this side ever agreed to admit anything that was not alleged in the indictment. If I am mistaken about that I would like to be advised about it.

Thereupon the following stipulation was entered into between counsel for both sides:

It is hereby stipulated between counsel for the Government and the defendants that the coal in the several counts of each indictment was sold to the parties mentioned in each count, respectively, at the rate and price and in the amount set forth in each count of said indictments, and that The Matthew Addy Company is a corporation organized under the laws of the State of Ohio.

The Court: Now, the stipulation does not cover the place of sale, I understand?

Mr. Graydon: No.

The Court: Does the indictment show it was done in this district each case?

Mr. Roudebush: Yes, Your Honor, in the City of Cincinnati,

Hamilton County, State of Ohio, within the jurisdiction of this court.

Mr. Graydon: Well, I think there would be no evidence to sustain that allegation, if Your Honor please. We can't admit it.

Mr. Roudebush: No, there won't be any evidence, because that was the understanding.

Mr. Graydon: There was no understanding. The indictment itself shows it was shipped from the mine outside of the jurisdiction of this court to a purchaser in Chicago, Illinois, outside of this jurisdiction; and the allegation is that Ford, within the jurisdiction, did wilfully, unlawfully, knowingly and feloniously ask, demand and receive a certain amount of money. Now, the facts, if developed, will show that the sale was made at the Chicago office, so we can't accede to any stipulation of that kind. I am just making that statement because I don't want it suggested that we are going back on any agreement with him.

Mr. Roudebush: Your Honor, under the circumstances I would like to have this case continued until we can get our witnesses here. Counsel for defendants—it was their proposition, and they asked us, said they wouldn't dispute the sales as charged in the indictment, and for that reason I did not subpoena any witnesses except one witness, as a mere form. Now they come in court and say they agree to admit the sales but they don't admit that the sales were made in this jurisdiction. Their office, their place of
49 business is here, and it seems to me it is no more than fair that we have an opportunity to produce our witnesses and as we would have produced our witnesses had we not come to the proposition of admitting these things in order to save the Government money. That is the only reason why we did not go into that matter.

Mr. Graydon: There wasn't any agreement, Your Honor, made by any counsel on behalf of the defendants in this case, except as has been stated, that in order to save the time of the court and expedite the trial of this case that we would concede such and such amounts of coal were sold to the respective individuals named in the different counts; that the prices at which they were sold were as stated in those counts, respectively, and that the amounts were as stated in those counts. It is impossible, if Your Honor please, that counsel could have conceded that these sales were made in this jurisdiction, because by so doing they would have made a concession contrary to the facts in respect to many of the counts; in fact, as to some of them the sales were made here, but I am indicating that to your Honor to rebut any suggestion that we made any agreement in regard to that matter. We did not expect to be found guilty or defend against the counts in which the proof showed that the court had no jurisdiction in regard to the offense, if any.

Mr. Cramer: If we had agreed to it the court wouldn't have had jurisdiction.

Mr. Graydon: I was going to suggest, if Your Honor please, that in view of the fact there are certain counts in which the evidence would establish that the sales were made here, we have no objection to proceeding on one or more of those counts. We make no concession or

admission in regard to any count in which the sale occurred or in which the money was demanded and received outside the jurisdiction of the court.

The Court: Will you specify those counts? Are you willing to specify those counts?

Mr. Graydon: I think that Mr. Cramer and Mr. Roudebush can pick them out.

The Court: Well, you might do that. We will take a few minutes' recess, gentlemen of the jury, while the counsel are conferring about this matter.

After a short recess the jury were returned into the jury box and the trial proceeded as follows:

50 The Court: What is the situation, gentlemen?

Mr. Graydon: Well, defendant is ready to proceed with the trial, Your Honor.

Mr. Roudebush: Your Honor, I would like to ask a continuance to the latter part of this week.

The Court: You mean a postponement?

Mr. Roudebush: I mean a postponement.

The Court: You don't want any continuance to the latter part of the week.

Mr. Graydon: I would like to know upon what ground the postponement is requested.

The Court: What is the ground, Mr. Roudebush?

Mr. Roudebush: On the ground that I understood the agreement I had with Mr. Samuels was to the effect that they would admit the sales were made as alleged in the indictment, and now they have raised the point that the court has not jurisdiction, that the sales were not made here. The indictment alleges that the sales were made within the jurisdiction of this court.

Mr. Cramer: That only covers part of them.

Mr. Samuels: We admit that some of them were made here.

The Court: What?

Mr. Samuels: We admit that some of the sales were made here.

Mr. Cramer: And denying the fact that we did anything of that kind. If we had admitted it it could not bestow jurisdiction on this court, if the evidence showed that the transaction took place in Chicago.

The Court: No, but an admission would be evidence of the fact.

Mr. Samuels: No such admission was made, if Your Honor please.

Mr. Graydon: If Your Honor please, the indictments charge simply a purchase by The Matthew Addy Company of coal from the Bluefield Coal Company in West Virginia, without the jurisdiction of the court, and then that The Matthew Addy Company did feloniously ask, demand and receive a certain stated price for sales of parts of this coal to various named persons; and in each count it is set forth where those persons are located, and some of them are located within the vicinity of Cincinnati, and the fact is that those sales were made here, and the prices fixed, and the demand.

51 And others for instance, one I have here, the Alexander Lumber Company, a corporation doing business in Chicago, Cook County, Illinois, and in respect to those the sales were made, as I understand it, at an office of the company in Chicago.

Now, Mr. Roudebush says he understood that counsel admitted certain facts. From what Mr. Samuels advises me, it is not a matter of understanding but a distinct statement that we would admit the names of the persons to whom the sales were made, including their addresses, the price at which they were sold, and the amounts at which they were sold. Now, just before Your Honor vacated the bench we had undertaken to point out, with the assistance of Mr. Ford, who has the complete record here, the actual facts about these transactions. Suddenly Mr. Roudebush comes in and says, "I think I will demand a continuance." Now, for what purpose I don't know. It may be he doubts the accuracy of Mr. Ford's statements, but I submit to Your Honor the defendant is here now, ready to meet this indictment, and unless he is unwilling to take our statement in regard to that, that the Government has no ground for asking for a continuance or postponement of the case.

The Court: It will seriously disarrange the calendar of the court to postpone the trial. I assume that the stipulation is not fairly understood in the same way by counsel for both sides. If the admissions which are offered by the defendants are sufficient to justify the Government in proceeding, I would much rather proceed, but I don't think the Government should be pressed to a conclusion of the trial at this time if it has fallen into error through a misunderstanding concerning a stipulation verbally made, perhaps not made as closely as it might have been.

Mr. Graydon: Well, if Your Honor please, I beg to suggest that in respect to those counts as to which the defendant admits the sales here, there certainly is no ground for not proceeding with the case. And, of course, the result of bringing in any evidence about these other counts will show that they were outside the jurisdiction of the court; there can't be any question of that.

The Court: How many counts.

Mr. Graydon: We have checked them over, Mr. Roudebush checked them, and we thought he was finished and satisfied.

52 Mr. Roudebush: Mr. Graydon, I didn't say anything about being satisfied. And about the statement Mr. Samuels made you are absolutely wrong. We did not go into details and make the statements that you say we made here.

Mr. Graydon: Did you make any agreement with Mr. Samuels specifically in respect to any of these sales, that they were made at a certain place?

Mr. Roudebush: Mr. Graydon, the truth of the matter is that I was going to have my witnesses subpoenaed, and Mr. Samuels came in here after the trial of another case and said "You needn't subpoena your witnesses; we will admit the sales as you allege them there." We did not go into details about it.

The Court: Now, let us see what we can do.

Mr. Graydon: All right.

The Court: Now, without regard to the past——

Mr. Graydon: Very well. I suppose I might assist Your Honor by going over the matter. The very first sale is the 10th of September to The Alexander Lumber Company, a corporation doing business in Chicago, Cook County, Illinois. Mr. Ford advises me that sale was made by a representative of the company at its office in Chicago to the Alexander Lumber Company of Chicago.

Mr. Rondebush: And approved here, wasn't it, Mr. Graydon—a contract signed here in Cincinnati, approved—subject to your confirmation?

Mr. Graydon: There was an acknowledgment of it.

Mr. Rondebush: Subject to the approval of Mr. Ford, here in Cincinnati?

Mr. Graydon: If there is any peculiar provision in the particular contract I suppose they could prove that. If there was a reservation of right after the taking of the order and agreement on the price, and that is going to bring that transaction within the jurisdiction, that is a case the court can actually pass on. I am talking about the facts.

The Court: The fact for the court is——

Mr. Rondebush: Your Honor, there is also a question of the payment. They seem to not want to admit that the people paid for the coal as it was sold.

Mr. Samuels: That is not an admission, whether they received it. They merely asked——

The Court: The indictment alleges asked, demanded and received it.

Mr. Graydon: We concede that. Well, the first one was at Chicago.

33 The Court: How many of them are here? Are there enough counts here to satisfy the Government?

Mr. Graydon: I think so, yes. The second is at Chicago; the third is at Chicago; the fourth one is at Chicago; the fifth was a sale to Wagner Manufacturing Company, Shelbyville—Shelby, Ohio.

Mr. Cramer: Sidney, Shelby County.

Mr. Graydon: The sixth count in the Ford indictment?

Mr. Cramer: No, the company indictment—the same thing.

Mr. Graydon: The sixth count was Cincinnati; seventh count, South End Supply Company, Chicago, was made at Chicago; eighth count, South End Supply Company, Chicago, was at Chicago; ninth count, Batavia, Clermont County, Ohio, was made at Cincinnati; the tenth count, Batavia, Ohio, made at Cincinnati; eleventh count, Cincinnati, Ohio, made at Cincinnati; twelfth count, Connersville, Indiana, made at Cincinnati; thirteenth was at Cincinnati; fourteenth, Cincinnati; fifteenth, Cincinnati; sixteenth, Cincinnati; seventeenth, Cincinnati; eighteenth, Kraft & Company, Chicago, was made at Chicago; nineteenth, same, Chicago, Illinois; twentieth, Frey Brothers, Chicago, made at Chicago; twenty-first, Frey Brothers, Chicago; twenty-second, Frey Brothers, Chicago; twenty-third, Frey Brothers, Chicago. That is the company.

The Court: That is about half of them, isn't it?

Mr. Graydon: About half.

Mr. Samuels: More than half—twelve out of twenty-three.

Mr. Graydon: This is Ford's, the Ford indictment. The first count, Frey Brothers, Chicago—that was at Chicago; second count, Chicago; third count, Chicago; fourth count, Chicago; fifth count, Cincinnati; sixth count, Cincinnati; seventh count, Cincinnati; eighth count, Cincinnati; ninth count, Cincinnati; tenth count, Cincinnati; eleventh count, Cincinnati; twelfth count, Cincinnati.

Mr. Samuels: Eight out of twelve.

Mr. Roudebush: Some of those were made out of Chicago.

Mr. Samuels: Eight out of twelve, out of Ford's.

The Court: I suppose defendant will be willing to stipulate with reference to those in which you say sales were made at Cincinnati, and that they were made at the place in the indictment alleged. Where you say the sales were made, I suppose that means did ask, demand and receive, as alleged in the indictment, the price therein alleged. And under those circumstances, is the Government ready to go ahead?

Mr. Roudebush: Do they admit the money was received here in Cincinnati?

Mr. Graydon: Yes, admit the venue of the offense as stated in the indictment.

The Court: What is there, then, in those indictments, that are matters of fact that are not admitted Mr. Graydon?

Mr. Graydon: Well, of course, it hasn't—the Government proposes to show the previous purchase. The matters of fact that are alleged in the stating part of the indictment is that there was a profit, or gross margin, realized upon it.

The Court: That is, you admit the purchase price and the sale price, but not—

Mr. Cramer: A profit.

The Court: That the difference constituted what is designated in the act as a gross margin?

Mr. Graydon: No, Your Honor.

Mr. Cramer: The indictment says profits.

Mr. Graydon: But we claim it did not constitute what is alleged in the indictment as having been a profit or gross margin.

The Court: Where the word "profit" in the indictment is mere surplusage, in order to convict it must be a gross margin.

Mr. Graydon: I would like Your Honor not to pass on the question whether that would be surplusage without hearing from us.

The Court: How could it be anything else?

Mr. Graydon: Briefly stated, an unnecessarily precise allegation of an essential fact must be proved as alleged—

The Court: No doubt of that.

Mr. Graydon: And especially in a case of this sort, Your Honor, where, if the Government is permitted to allege in an indictment, under an indictment aimed at profiteering, and that matter is in the air, and a jury is impaneled to try a case, if they can be permitted to allege, without proving, that a gross profit charged, a

gross margin charged was a profit, to that extent it is highly prejudicial. Unless they propose to prove that——

55 The Court: The terms of the indictment are a profit or gross margin.

Mr. Graydon: That means "to-wit." Under the established authorities that is an alternative of two things, that is to say, a profit or, to-wit, a gross margin.

The Court: What difference is it from alleging a gross margin?

Mr. Graydon: They must prove it was a profit and a gross margin, that is to say, we were under no expense whatever in doing business.

Mr. Cramer: We are accused of profiteering.

The Court: We will come to that question later. That is a question of construction, rather than of fact.

Mr. Graydon: Yes, I think it is a question that arises on the face of the indictment, because I suppose the court could take notice that a jobber, as defined in the act, doesn't do business without some expense.

The Court: At any rate, that question will arise when we come to it. Then are you ready to proceed, Mr. Roudebush?

Mr. Roudebush: Your Honor, if we get this stipulation so there can't be any question about these things they have stated now, so there won't be another argument in ten minutes——

Mr. Graydon: We propose to argue our clients' cases at any appropriate time the question arises.

Thereupon the following stipulation was entered into between counsel:

It is stipulated between counsel that the transactions in the 5th, 6th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th and 17th counts of the indictment against The Matthew Addy Company were that the defendant, The Matthew Addy Company, acting in the capacity of a coal jobber, did ask, demand and receive from the parties in the said counts respectively set forth, for the quantities of bituminous coal in the said counts respectively set forth, a price of three dollars and fifty cents per ton f. o. b. at the mines producing said coal; that the said price of three dollars and fifty cents was twenty-five cents in excess of the price at which said The Matthew Addy Company had theretofore purchased said coal on July 31, 1917, per ton of 2,000 pounds, in the city of Cincinnati, Hamilton County, Ohio, at the times in the said counts respectively set forth.

26 The Court: Are the defendants willing to accept that?

Mr. Graydon: They are.

The Court: The Government can put on its proof as to the other counts.

Mr. Graydon: That is only in one indictment we have stipulated.

The Court: The other indictment, I suppose the stipulation would be the same.

Mr. Graydon: It will be the same, but we will have to specify the counts.

The Court: I suppose it would be that the defendant Mr. Ford, instead of the defendant The Matthew Addy Company—

Mr. Cramer: Substituting Mr. Ford's name and the number of the indictments.

The Court: The numbers of the counts. What are the numbers of the counts in the other indictment. Have you got that, Mr. Roudebush, the numbers of the counts in the Ford indictment that they admitted?

Mr. Graydon: Before stipulating to that, if Your Honor please, we want to ask the Government to elect whether they will proceed against Mr. Ford or the company. It is not charged he did that individually.

Mr. Cramer: It is charged he did it as an officer of the company.

The Court: Why should there be any election?

Mr. Graydon: I don't want to stipulate that Mr. Ford did this transaction other than as alleged—that he did it as an officer of the company, that's all. Your Honor suggested we stipulate that he—

The Court: I don't think there would be a right of election.

Mr. Graydon: I will make that motion and reserve an exception.

The Court: Overruled.

Mr. Cramer: Reserve an exception.

Mr. Graydon: Then in regard to the Ford indictment the counts at Cincinnati are the fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth.

Mr. Cramer: That is eight out of the twelve.

The Court: Very well. Are you ready to proceed now?

Mr. Roudebush: What will be the disposition of the other counts?

57 The Court: The Government will be put on its proof.

Mr. Roudebush: Can we have a postponement as to those other counts?

The Court: No, you can not have a postponement. The Government will be put on its proof on the other counts.

Mr. Roudebush: Will we have an opportunity to get our witnesses here for those?

The Court: If you can get them here tomorrow.

Mr. Roudebush: They are in Chicago.

The Court: You will have to get them here tomorrow morning. This was the time the case was set down to be tried.

Mr. Graydon: Let the stenographer note in respect to the Matthew Addy and Ford indictments that the defendants moved to elect as to which defendant it will proceed against, which motion was overruled, and the defendants excepted, and that that applies to each count in that indictment.

Thereupon the jury were returned into the jury box.

The Court: The jurors are all present. Do you want to offer that stipulation to start with?

Mr. Roudebush: We will call Mr. Easley.

The Court: Do you want to offer this stipulation?

Mr. Roudebush: Yes, sir.

hereupon the stipulations in regard to both indictments were to the jury.

Mr. Roudebush: It is also admitted the company is a corporation under the laws of—

Mr. Cramer: That was agreed in the other stipulation.

The Court: It is also agreed that the company is a corporation. Do you have a witness to call?

Mr. Roudebush: Call Mr. Easley.

The witness FRANK S. EASLEY, sworn on behalf of the government testified he lived in Bluefield, W. Va., and did business there as president of the Bluefield Coal & Coke Company. That company had a contract with The Matthew Addy Company dated July 31, 1917, for the sale of forty car-loads of bituminous run-of-mine coal, and on behalf of The Matthew Addy Company, by B. N. Ford, another contract of same date. Said contracts offered in evidence as government exhibits No. 1. and No. 2.

The coal was shipped by the Bluefield Coal and Coke Company, on orders of The Matthew Addy Company as follows:

- Mar. 10, 1917, to Consumers Coal and Supply Company, Elkhart, Ind.
- Mar. 22, 1917, to Alexander Lumber Co.
- Mar. 6, 1917, Fred Kluckhohn, Napersville, Ind.
- Mar. 12, 1917, Fred Kluckhohn, same address.
- Oct. 16, 1917, Wagner Mfg. Co., Sydney, Ohio.
- Nov. 12, 1917, South End Supply Co., Chicago, Illinois.
- Nov. 16, 1917, South End Supply Co., Chicago, Illinois.
- Oct. 19, 1917, Rice & Laub, Batavia, Ohio.
- Sept. 25, 1917, Rice & Laub, Batavia, Ohio.
- Nov. 9, 1917, Boye & Emmes Machine Tool Co., Cincinnati, Ohio.
- Oct. 18, 1917, Connellsville Lumber Co., Connellsville, Ind.
- Oct. 10, 1917, Consumers Coal & Supply Co., Elkhart, Ind.
- Sept. 25, 1917, Consumers Coal & Supply Co., Elkhart, Ind.
- Oct. 13, 1917, Frank M. Dell, Indianapolis, Ind.
- Oct. 26, 1917, Frank M. Dell, Indianapolis, Ind.
- Oct. 20, 1917, D. G. McFadden, Ridgeville, Ind.
- Oct. 24, 1917, Kraft & Co., Chicago, Ill.
- Oct. 22, 1917, Kraft & Co., Chicago, Ill.
- Oct. 8, 1917, Frey Bros., Chicago, Ill.
- Nov. 13, 1917, Frey Bros., Chicago, Ill.
- Nov. 8, 1917, Frey Bros., Chicago, Ill.
- Oct. 25, 1917, Frey Bros., Chicago, Ill.

These cars were all approximately fifty tons. Defendants objected to all the dates on the ground that they were immaterial and excepted to the overruling of the objection. All the shipments were requisitions upon the coal purchased by The Matthews Company from the Bluefield Company.

On cross-examination the witness testified that the contracts, Exhibits No. 1 and No. 2 were made on behalf of The Bluefield Coal & Coke Company, by S. S. Kofer, its general manager, duly authorized.

FRED C. REIF, a witness for the government, residence 267 McMillan street, Cincinnati, Ohio, office man in the Boye Emmes Machine Tool Company, Cincinnati, testified that that company bought on car-load of Pocahontas run-of-mine coal on an order of September 1, 1917 at \$3.50 a ton of 2,000 lbs., which was shipped to the purchaser at Cincinnati, by the Bluefield Coal & Coke Company, shipment being made from Honaker, Virginia. The order was given to The Matthew-Addy Company by telephone in Cincinnati and payment was made here. The witness produced and offered in evidence government Exhibit No. 3, being the bill for said car-load of coal, government Exhibit No. 4, being the check in payment therefor, and government Exhibit No. 5, being the bill of lading.

HENRY H. GRUNKEMEYER, 3717 Eastern Avenue, Cincinnati, manager of the Whetstone Coal Company, 64 Congress Avenue, Cincinnati, testified that he purchased a car of Pocahontas run-of-mine coal from the Matthew-Addy Company, September 11, 1917, at \$3.50 a ton, through defendant Ford. The order was given over the telephone in Cincinnati, and payment made here by check. The witness produced and the government offered in evidence Exhibits No. 6, No. 7 and No. 8, being the invoice, check and order on said shipment respectively. There was no contract for the purchase of this coal prior to September 7, 1917.

H. M. RICE, of Batavia, Clermont County, Ohio, doing business there as Rice & Laub Coal Company, testified that he made the purchases already stipulated, being two carloads as charged in the indictment; that the contract was made in the office of The Matthew-Addy Company in Cincinnati with Mr. B. N. Ford, sometime after government had set the price on coal, and payment made here, also that there was no previous contract. The government offered in evidence government exhibits Nos. 9, 10, and 11, being freight bill, invoices and checks covering these two shipments.

IVAN M. MCCLATCHIE, of Chicago, Illinois, buyer for Alexander Lumber Company, testified that he purchased coal for that company from The Matthew-Addy Company on or about September 10, 1917. The coal was Pocahontas run-of-mine and the contract was made with Mr. Zimmerman, Chicago representative of The Matthew-Addy Company in Chicago. The price was \$3.50 a ton and there was no previous contract between The Matthew-Addy Company and the Alexander Lumber Company. Government Exhibits Nos. 12 and 13, being the original purchase order and invoice on this purchase order and invoice on this purchase were offered in evidence.

On cross-examination the witness testified to his signature to a letter of October 18th, to A. J. Devlin, Special Agent of the Department of Justice which was offered in evidence as defendant's Exhibit A.

F. W. CORNELIUS, of Indianapolis, Indiana, General Manager of Frank M. Dell, as a witness for the government testified to a purchase from the Matthew-Addy Company of a car of red ash run-of-mine coal at \$3.50 per ton; purchase having been made at Cincinnati, Ohio, without any previous contract. Government Exhibits 14, 15 and 16, being the invoice, the check and contract covering the foregoing transaction were offered in evidence.

D. G. MCFADDEN, doing business as D. G. McFadden Grain Company, of Ridgeville, Indiana, testified to a purchase of a carload of coal from The Matthew-Addy Company on or about September 4, 1917, at \$3.50 per ton at the mines, being Pocahontas run-of-mine. The check in payment thereof was mailed to The Matthew-Addy Company at Cincinnati. The contract signed by B. N. Ford, Vice President of The Matthew-Addy Company, was offered in evidence as government Exhibit No. 17.

WILLIAM KRAFT, 4350 North Leavitt street, Chicago, sworn as a witness for the government, testified to a purchase of coal from The Matthew-Addy Company, September 13, 1917, for \$3.50 per ton. He had no previous contract for the coal. Payment was made by check sent to Cincinnati. Witness produced, and government put in evidence the invoices being Exhibits Nos. 18 and 19.

On cross-examination the witness testified that the order was given and accepted, the price fixed at Chicago, Illinois.

GEORGE J. FREY, a witness for the government, residence 1914 Summerdale avenue, Chicago, doing business under the name of Frey Brothers, testified to a purchase of coal from The Matthew-Addy Company on or about September 10, 1917, consisting of four carloads at \$3.50 per ton, and produced the checks in payment therefor, the invoices and expense bills which were offered in evidence as government Exhibits Nos. 20 to 34 inclusive. The coal was Pocahontas run-of-mine, the price \$3.50 per ton at the mines, and there was no contract for the purchase previous to September 1, 1917. On cross-examination the witness testified that he obtained the price and accepted the offer on all four cars as a single transaction in the office of The Matthew-Addy Company in Chicago, Illinois, through Mr. Zimmerman.

FRED R. KLUCKHOHN, a retail coal dealer of Naperville, Illinois, testified to a purchase on September 7, 1917, from The Matthew-Addy Company, and produced an invoice covering two cars. He had no contract prior to September 7th insofar as he could recollect. He stated that he did his business through the Chicago office of The Matthew-Addy Company, but the invoice was stamped

at Cincinnati. The two invoices and confirmation of the order were offered in evidence as government Exhibits Nos. 35, 36 and 37. On cross-examination the witness testified that the transaction occurred in Chicago; and that he had no dealings with the Cincinnati office. The two cars were a single transaction.

FRANK G. KOZLOWSKI, of West Pullman, Chicago, Illinois, called as a witness by the government testified that he was a coal dealer in West Pullman, carrying on business under the name of West Pullman Fuel Company; that he purchased coal from the Matthew-Addy Company on or about September 8, 1917, having no contract previous to that day; that he paid for the same by sending in check to the Chicago office of The Matthew-Addy Company, which check and the invoice were offered in evidence as government Exhibits Nos. 38 and 39.

ELMER FRED ERICKSON, Manager South End Supply Co., Kensington, Illinois, testified to a purchase of coal from The Matthew-Addy Company, September 13, 1917, without previous order at \$3.50 per ton. Payment was made by checks sent to Cincinnati, which checks are offered in evidence as government Exhibits Nos. 40 and 41. The sale was made and confirmed through the Chicago office of The Matthew-Addy Company.

J. M. HUMPHREY, 3560 Vista Avenue, Cincinnati, called as a witness for the government testified that in the fall of 1917 he was working for The Matthew-Addy Company in Cincinnati, of which B. N. Ford was general manager of the coal department, passing upon the purchases and sales. The witness was engaged in buying and selling and assisting in the office.

Witness stated that The Matthew-Addy Company was a jobber, that is to say, a person who purchases and resells coal to coal dealers or consumers without physically handling it on, over or through his own vehicle, trestle, dock or yard. The company had a branch office in Chicago, the main office being at Cincinnati. The
62 witness testified that he offered for sale the coal covered by the indictment at \$3.50 per ton f. o. b. mines under instructions of B. N. Ford. The witness could not recall the persons to whom he offered the coal for sale, but being shown a list by the United States attorney said "I think possible I sold this F. M. Dell of Indianapolis, Indiana, a car, and probably offered for sale to The Consumers Coal & Supply Company, Elkhart, Indiana; those two I think possibly I sold." On cross-examination the witness testified he recalled that he had sold Frank M. Dell and The Consumers Coal & Supply Company.

On cross-examination witness testified that he left the employment of The Matthew-Addy Company sometime in July, 1918, that "possibly" he was discharged. He had a conference with the United States attorney or a representative of the Department of Justice in regard to testifying in the case. This conference was in the Federal Building at Cincinnati. He did not advise the United

ies attorney or any representative of the Department of Justice
Mr. Ford had authorized or fixed the price of the coal at \$3.50.
e substance of his conversation with them was that the witness
asked as to who was in charge of the coal department of The
Matthew-Addy Company.

It was thereupon stipulated between counsel for the government
for the defendants in respect to counts five and six of The Mat-
w-Addy indictment that the purchaser of the coal covered by said
nts, The Wagner Manufacturing Company of Sydney, Ohio, pur-
sed the two cars as one transaction on September 7, 1917, without
previous contract.

n respect to the twelfth and thirteenth counts in the indictment
inst The Matthew-Addy Company covering two cars, being one
saction, that the purchaser, Connellsville Lumber Company, had
contract for the purchase prior to September 12, 1917.

The Court: Does the Government rest with that?

Mr. Roudebush: Yes, Your Honor.

Mr. Graydon: If Your Honor please, I move to dismiss the in-
ments, each of them, and each count separately.

The Court: Gentlemen of the jury, you may have a recess until
are called.

Thereupon the Jury retired from the court room.

Mr. Graydon: At the close of the evidence for the Gov-
ernment the defendants, and each of them, move the court to
dismiss the cases and each count of each indictment, sepa-
ely, on the ground that the indictments state no offense, and that
evidence fails to substantiate the allegations of the indictment
each count therein, respectively, and on the grounds, and es-
sially relying upon all the grounds heretofore stated in support
he motions to quash and the demurrers.

and the defendants, and each of them, move the court separately
dismiss the first count of the indictment against The Matthew-
ly Company, on the ground that it appears that the transaction
not occur within the jurisdiction of the court; and the same in
ect to the second count of the indictment against The Mat-
r-Addy Company; and the same in respect to the third count.
and if said motion in respect to the second and third counts be
granted, defendant, The Matthew-Addy Company, moves the
rt to require the Government to elect whether it will proceed
n said second count or said third count, on the ground that the
lence shows that they constituted a single transaction within the
ning of the statute.

and defendant, The Matthew-Addy Company, moves the court to
niss the fourth count on the ground that the evidence showed
the transaction occurred outside the jurisdiction of the court.
and in regard to the fifth and sixth counts, being sales to the Wag-
Manufacturing Company of Shelby County, Ohio, defendant
es to require the Government to elect upon which count it will
eed, on the ground that the two constitute a single transaction.

In regard to the seventh and eighth counts defendant moves the court to dismiss the same on the ground that the transactions occurred outside the jurisdiction of the court; and, if said motion be not granted, to require the Government to elect upon which it will proceed, on the grounds heretofore stated.

In respect to the thirteenth count and the fourteenth count, defendant moves the court to require the Government to elect, on the ground that the two constitute a single transaction under the statute.

In regard to the eighteenth count defendant moves the court to dismiss, on the ground that the transaction occurred outside the jurisdiction of the court. The same motion in regard to the
64 nineteenth count. And if said motions in respect to either of said eighteenth or nineteenth counts be not granted, to require the Government to elect upon which it will proceed, the two constituting a single transaction under the statute.

And the defendant moves the court, in respect to the nineteenth, twentieth, twenty-first, twenty-second and twenty-third counts, to dismiss the same, and each of them, on the ground that the evidence shows that they occurred outside the jurisdiction of the court; and in regard to, and if said motion be not granted in respect to said twentieth, twenty-first, twenty-second and twenty-third counts, defendant moves the court to require the Government to elect upon which of said four counts it will proceed, upon the ground that said four carloads covered in each of said counts constitute one transaction within the meaning of the statute.

In the indictment against B. N. Ford defendant moves the court to dismiss the first count, on the ground that the transaction occurred without the jurisdiction of the court; and the same motion in respect to the second, third, and fourth counts; and if such motion be not granted in respect to any or all of said counts, said defendant moves the court to require the Government to elect upon which of said counts it will proceed, on the ground that they all constitute a single transaction within the meaning of the statute.

In respect to the fifth and sixth counts, defendant moves the court to require the Government to elect upon which it will proceed, upon the ground that said two counts constitute a single transaction under the statute. And the same motion in respect to the seventh and eighth counts. And the same motion in respect to the tenth and eleventh counts.

The Court: Anything else?

Mr. Graydon: I would like to present to Your Honor another ground that hasn't been suggested specifically for holding these indictments bad, if it isn't too late to suggest it.

The Court: Proceed.

Thereupon counsel proceeded to present the point suggested to the court, after which the following proceedings were had:

The Court: This morning I sustained objection of the defendant to evidence proposed by the Government to show that def-
65 endants had knowledge of the rules promulgated. At that time I had not in mind the exact language of the penal clause of Section 25 of the Lever Act, providing "that whoever shall, with

knowledge of the regulations prescribed under the act, violate," etc. The Government may therefore have leave to recall its witness upon the subject of such knowledge.

With reference to the term in the indictment "profit or gross margin," if we assume—and it would be fair to assume—that some expense attaches to the business of jobbing coal, the terms "profit" and "gross margin" would not be synonymous with the profit to be taken to mean net profit, but if the profit be understood to mean in the indictment "gross profit" then the two terms would be synonymous. And whether we read the word "or" in its ordinary significance as "or," or whether we read it as contended by the defendants it is to be read, that is to say, "to-wit," the allegation would be unintelligible unless we understand the word "profit" to mean gross profit." But, so reading it, it is entirely intelligible—in fact, the words "gross margin" then become a definition of the word "profit." It is as though it were said "profit, that is to say, the gross profit, the difference between the cost price and the selling price." Therefore, it seems that the Government is not restricted to the showing of a net profit exclusive of expenses to sustain the indictment, but to showing that a margin, gross margin, which has been done, is sufficient.

The sufficiency of the indictment, generally speaking, has been heretofore passed upon in the ruling on the motion to quash and the ruling upon the demurrer to the indictment. It is now urged that the phrase in the second section of the Presidential Order of August 1917, which reads "For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of fifteen cents per ton of two thousand pounds"—it is contended that the phrase means for a future transaction embracing both buying and selling of coal a jobber shall not add. Whether it be held a regulation of the coal business or a fixing of price, I am of opinion that it was within the power of the President to prescribe a gross margin that a jobber might earn under the terms of the law. Having in mind the well-known practice of West Virginia bituminous fields to contract in advance for the mine output, the total mine output, or substantially so, from season to season, a regulations prescribing prices of coal that left existing contracts in force and prescribed no margin of profit to the jobber, permitted him to ask, demand and receive so much in excess of contract price as he might be able, under the exigencies of the then existing, to get, would have fallen far short of the regulation. The prices of coal that Congress undoubtedly intended to secure by law. In my opinion, the phrase "For the buying and selling of bituminous coal a jobber shall not add" means that he shall not subtract add, whether the contract for the coal took place before or after the promulgation of the Presidential Order.

And, therefore, the motion to dismiss the several counts upon the grounds mentioned is overruled as to each respective count.

Dr. Graydon: Note our exception.

The Court: It is further moved to require the Government to state between counts in those instances in which the transaction in-

volved a shipment of more than one carload lot. The Government, in the indictments, seems to have regarded each carload necessarily as a separate transaction; but it is not so. The purchase and sale of a certain quantity or tonnage of coal was the transaction, regardless of the number of cars that might be required to contain or transport the same; and inasmuch as one transaction can only be made the subject of a single count, in each of those instances the Government will be required to elect between or among the counts covering the single transaction.

Have I covered everything that has been proposed?

Mr. Roudebush: Your Honor, could we adjourn at this point for the noon recess, until we have an opportunity to check up these different counts, and also to get our witnesses here?

The Court: Very well. We will at this time recess until two o'clock. Bring in the jury.

Thereupon the jury were returned into the jury box, and after they had been duly cautioned by the court a recess was taken until two o'clock in the afternoon of the same day, at which time the trial proceeded as follows:

Afternoon Session, Wednesday, June 2, 1920.

Court met pursuant to recess, all counsel being present.

Mr. Graydon: The court did not say anything specifically about the venue of some of these contracts. I did not know
67 whether that matter was one that had been overlooked.

The Court: It was overlooked. There were certain of these counts with regard to the venue. I confess I haven't the evidence as to each count specifically in mind. I will have to rely upon the assistance of counsel in that regard, I expect.

Mr. Roudebush: Your Honor, I have Mr. Humphrey here, if you care to go on with the testimony.

The Court: No, let us pass upon the matter of venue before we proceed any further with these other counts. The first four counts of the company indictment were not covered by the stipulation. What was the evidence with regard to the venue on the first four counts? The first count was the Alexander Lumber Company. Someone was here from the Alexander Lumber Company, was he not? Who was that?

Mr. Roudebush: Mr. McClatchie.

The Court: Well, he said he made the contract with Mr. Zimmerman, that he doesn't know whom he paid. As to that count the motion will be granted, I think, Mr. Roudebush.

Mr. Roudebush: If Your Honor please, there is in evidence Government Exhibit No. 12, which shows that the payment was made here at Cincinnati.

The Court: What does it show?

Mr. Graydon: It shows it billed or made out at Cincinnati, that is all.

Mr. Roudebush: It is marked Cincinnati.

The Court: Let the motion on that count be granted, Count Number One of The Matthew Addy Company indictment.

Now, the second count charges with reference to Fred Kluckhohn. Do we have anybody with regard to Fred Kluckhohn? He was a man from Haperville, Illinois?

Mr. Graydon: Naperville, Illinois.

The Court: I got it Naperville. He said he couldn't recollect where the payment was made, except there was an invoice stamped "Paid" at Cincinnati.

Mr. Roudebush: It is in evidence here, marked "The Matthew Addy Company, Cincinnati, Ohio, Paid December 6." Also says, "When due please remit to Treasurer of The Matthew Addy Company, Box 665, Cincinnati, Ohio"; also one marked "Paid" at Cincinnati, Ohio, November 6th.

Mr. Cramer: He testified he purchased that coal from Mr. Zimmerman. Zimmerman gave him the car numbers and he told him he would take them.

Mr. Roudebush: There is also in evidence Exhibit No. 37, showing that The Matthew Addy Company accepted this, by B. N. Ford, Cincinnati, Ohio.

Mr. Cramer: Accepted what? Acknowledged receipt of the order, all.

Mr. Graydon: Acknowledged receipt of the order.

Mr. Roudebush: On the back of it it says no sale is valid unless accepted by an officer of the company here at Cincinnati.

The Court: I expect the motion will have to be overruled as to this second count.

Mr. Graydon: Note an exception.

The Court: Now, the third one——

Mr. Roudebush: We will elect the second count, Your Honor.

The Court: You elect the second count, do you?

Mr. Roudebush: Yes, Your Honor.

The Court: Let the election be noted. The fourth count is West Bullman Company.

Mr. Graydon: He said he sent the check to the Chicago office.

The Court: In the absence of any record evidence, that motion will have to be granted. There was nothing but an invoice.

Mr. Roudebush: There was an invoice and check showing it was paid at the Cincinnati office.

The Court: Is the check there?

Mr. Roudebush: Yes, Your Honor.

The Court: What does the check show?

Mr. Roudebush: Pay to the order of the Citizens National Bank, Cincinnati, Ohio, The Matthew Addy Company by R. M. Lambert, Treasurer. It also has on the bill "Paid The Matthew Addy Company, Cincinnati, Ohio." Also, "When due, please remit to Treasurer, The Matthew Addy Company, Cincinnati, Ohio."

Mr. Graydon: I don't think that request is of any significance, Your Honor please.

Mr. Roudebush: It is stamped on the bill.

Mr. Graydon: The entire accounting department is here, and having sent the check in payment to the Chicago office, they could transmit it to any place without changing the venue of the offense.

The Court: He said he paid the check to the Chicago office. Let that motion be granted. Now, the next one is what?

Mr. Graydon: The fifth and sixth were Cincinnati transactions.

The Court: That was to elect between the fifth and sixth?

Mr. Roudebush: We elect, Your Honor, to take the fifth, as between the fifth and sixth counts.

The Court: You elected the second as between the second and third, did you?

Mr. Roudebush: The second as between the second and third.

The Court: And you now elect the fifth as between the fifth and sixth?

Mr. Roudebush: As between the fifth and sixth.

The Court: Now, with reference to the seventh and eighth counts?

Mr. Roudebush: We elect the seventh as between the seventh and eighth.

The Court: You elect to stand on the seventh?

Mr. Roudebush: Yes, Your Honor.

The Court: Now the motion is directed against the seventh and eighth also, I believe?

Mr. Graydon: Yes, sir.

The Court: South End Supply Company. Was anyone here from the South End Supply Company?

Mr. Roudebush: Yes, Your Honor—Mr. Erickson.

The Court: He said he made payment to Cincinnati, Ohio. Let the motion be overruled.

Mr. Graydon: Note an exception.

The Court: The eighth?

Mr. Roudebush: We elect the seventh as between the seventh and eighth.

The Court: Yes.

Mr. Roudebush: The ninth and tenth, Your Honor, are different transactions, on different dates. The ninth count was ordered on the 26th of August.

The Court: I haven't any motion here to elect between the ninth and tenth. The next motion I have is to elect between the thirteenth and fourteenth.

Mr. Roudebush: We elect the thirteenth as between the thirteenth and fourteenth. This was at Cincinnati. It is covered by the stipulation.

The Court: Now, was there a motion to dismiss as to the thirteenth and fourteenth?

70 Mr. Graydon: No.

The Court: No. They were covered by the stipulation. What was the next motion to dismiss?

Mr. Roudebush: The eighteenth, I think—eighteenth and nineteenth, to elect.

The Court: The eighteenth count was with Kraft & Company.

Kraft was here. He said he paid to Cincinnati, Ohio. Motion overruled.

Mr. Graydon: Note an exception. There was a motion to elect in regard to that.

Mr. Roudebush: We elect the eighteenth as between the eighteenth and nineteenth.

The Court: You elect the eighteenth as between the eighteenth and nineteenth. Twentieth count?

Mr. Graydon: Twentieth, twenty-first, twenty-second and twenty-third are all Frey Brothers, of Chicago, on the 10th of September. Motion to elect as between those four.

Mr. Roudebush: Your Honor, we elect to——

The Court: Wait until I pass on the motion to dismiss, first. Who was here from Frey Brothers?

Mr. Roudebush: George J. Frey.

The Court: He said he paid The Matthew Addy Company by mailing a check to Cincinnati, so the motion to dismiss will be overruled.

Mr. Graydon: Note an exception.

Mr. Roudebush: We elect the twentieth as between the twentieth, twenty-first, twenty-second and twenty-third.

The Court: Very well; we will go back and see which ones of these counts are out.

Mr. Graydon: The first is out.

The Court: Was that dismissed or an election?—Dismissed.

Mr. Graydon: The third is out on an election; fourth was dismissed; the sixth is out on an election; the eighth is out on the Government's election; the fourteenth is out on the Government's election; the nineteenth is out on the Government's election; the twenty-first, twenty-second, twenty-third are out on the Government's election.

The Court: Now we will pass to the Ford indictment. Do you elect the fifth or the sixth count, Mr. Roudebush?

Mr. Graydon: There is an election between the first four.

71 Mr. Roudebush: The first, second, third and fourth, Your Honor. We elect the first in regard to the first, second, third and fourth.

The Court: Between the fifth and sixth?

Mr. Roudebush: The fifth as between the fifth and sixth.

The Court: Between the seventh and eighth?

Mr. Roudebush: Your Honor, the seventh and eighth were different transactions. That is the one at Batavia, Ohio, one sold on the 26th of August and one on September 8th. That is one I spoke of a minute ago.

Mr. Graydon: I think that is correct.

The Court: Very well; there is no election to be required between those. Between ten and eleven?

Mr. Roudebush: Ten as between ten and eleven.

The Court: Now, which ones—in which ones was the jurisdiction in question? The jurisdiction was questioned, I believe, on the first four counts only. The others were covered by the stipulation.

Mr. Roudebush: Your Honor overruled that. That was Frey Brothers. He was here.

The Court: The fourth count?

Mr. Roudebush: The first three.

The Court: You elect the first count. That is Frey Brothers.

Mr. Roudebush: That is Frey Brothers. He was here.

The Court: The motion as to Frey Brothers will be overruled, the first count.

Mr. Graydon: Note an exception.

The Court: That therefore takes out the second, third, fourth, sixth and eleventh counts, does it not?

Mr. Roudebush: Yes.

Thereupon, J. M. HUMPHREY, being recalled as a witness for the government, was asked whether he knew whether Mr. B. N. Ford was aware of the regulation promulgated by the President of August 23, 1917, "whereby the jobbers' gross margin was fixed at 15 cents per ton of 2,000 lbs." On objection being sustained, he was asked whether he had any conversation with B. N. Ford on or about August 23, 1917, relative to said regulation, and answered that he had a conversation with Ford two or three days after the ruling came out. The substance of the conversation was that the witness asked Ford what should be added as a commission of the Matthew Addy

Company to coal which the company had on contract and
72 "he advised me that we were to add 15 cents on our regular stuff on which we did have contract, but on the stuff such as that Pocahontas coal we were to add 25 cents per ton as we had been doing." The witness also had other conversations with Ford in respect to rulings that were being promulgated in Washington from time to time and also a discussion with Ford on or about August 23d in regard to the gross margin of 15 cents. Particularly in respect to the coal purchased from the Bluefield Coal & Coke Company, Ford instructed the witness to quote that coal at \$3.50 which he did. Witness stated that he and Ford discussed the government's regulations, which was 15 cents a ton, but said, "I was to add the 25 cents a ton which we had been adding." The witness stated that he (Ford) knew it was in effect; he knew there was a 15 cent gross margin in effect. On motion of defendants this answer was stricken out.

Witness testified to a conversation with Ford on or about August 23, 1917, concerning the regulation of that day and said that Ford told the witness that "the regulation was a gross margin of 15 cents a ton."

The witness stated that on or about August 23, 1917, The Matthew Addy Company was receiving bulletins issued by the Fuel Administration in Washington, containing orders and regulations, and received such a bulletin promulgated August 23, 1917, with reference to jobbers' margins in bituminous coal. The witness further stated that coal journals of the National Coal Jobbers were also received in the office. One publication of this journal the witness stated to the best of his knowledge contained the same issue that was published by the government.

Mr. Ford had the regulation of August 23, 1917, on his desk.

On cross examination the witness stated that in the months of August and September, 1917, he was traveling buying and selling coal possibly in Harlem, Letcher and Perry Counties, Kentucky. Sometime during 1917 he was in East Bernstadt in Laurel County, Kentucky, and also made a trip to West Virginia. Witness could not state whether he was in Cincinnati any time in August, 1917, or that he was there during the first week in September; nor the second week in September. He ceased to be employed by The Matthew Addy Company in July, 1918, having been with them three years or more.

The witness stated that the first time he ever saw the regulation of August 23, 1917, was in Mr. Ford's office, and that he read it, but could not give the date. Sometime in the fall of 1917 he was at Whitesburg, Kentucky, and later may have been in Lexington. When Mr. Ford discharged the witness from the employment of The Matthew Addy Company he spoke to him about "your habit of drinking."

Thereupon the witness J. M. Humphrey retired from the witness stand.

The Court: Anything further from the Government?

Mr. Roudebush: No.

Mr. Graydon: We renew the motions made, if Your Honor please, on the same grounds and on the additional ground of a failure of proof to show knowledge in respect to any particular time named in the different counts in the indictments.

The Court: Same ruling on it, respectively, the same ruling on each one of the motions that was made before.

Mr. Graydon: Note an exception. We will offer in evidence, if Your Honor please, a copy of what is known as the Lane-Peabody agreement—

Mr. Roudebush: I object to that, and object to any statements before the jury relative to that.

Mr. Graydon: I haven't made any statements, except an offer of it.

Mr. Samuels: If Your Honor please, Mr. Roudebush has admitted that this is the paper so designated, without any additional proof.

The Court: Any question about the designation of the paper?

Mr. Roudebush: No, Your Honor. I said they wouldn't have to bring any witnesses to prove the paper.

The Court: Your objection goes to substance, not as to execution of the document?

Mr. Roudebush: Absolutely.

The Court: Perhaps the jurors had best step aside a few minutes.

Thereupon the jury retired from the court room.

The Court: What is the purpose of the offer, please?

Mr. Graydon: If Your Honor please, this agreement was one that was made by a quasi-official body, Secretary Lane and Mr. Pea-

body representing miners and the Government, and thereunder it fixed certain prices and a commission of twenty-five cents. Now, it

74 has already been testified by this last witness that that commission of twenty-five cents was followed in respect to certain of the coal sold, and he is undertaking to testify further that Mr. Ford had knowledge of the regulation of August 23rd. I think that this document is competent possibly to rebut any inference of knowledge in regard to that, and indicate from where the twenty-five-cent price which was in force at the same time as this fifteen-cent price, came.

The Court: What is the date of the agreement?

Mr. Graydon: July 28, 1917, never expressly advocated by the parties that made it nor expressly repealed by any proclamation of the President, as far as I know. It was put forth under a conference, under an act of Congress, and the action taken at the conference, as announced in the official proclamation of the Department of the Interior, fixed the prices on bituminous coals at various amounts, and twenty-five cents for a net ton was fixed as the maximum price per ton for coal jobbers' commissions, with only one commission, no matter how many jobbers' hands the coal may pass through.

The Court: Did it fix any fifteen-cent price?

Mr. Graydon: No, Your Honor. It seems to me that is competent especially in relation to this question of the violation of the fifteen-cent regulation with knowledge. The only testimony on that point is rather indefinite as to time, the statement of this witness that Mr. Ford was advised about that fifteen-cent regulation. Now, of course, the jury doesn't have to credit the statement of that witness, and I think they have got a right to know that Mr. Ford before that time knew about the twenty-five-cent commission.

The Court: Well, if the agreement fixed a fifteen-cent rate in certain instances, which would tend to explain the giving of the fifteen-cent rate, the last witness' testimony as to the fifteen-cent rate on non-contract coal, it might possibly reflect upon the situation; but it shows nothing but a twenty-five-cent rate, and that doesn't seem to me to reflect upon his knowledge at all as to this order. I am inclined to think that will have to be excluded.

Mr. Samuels: It might also, if Your Honor please, go to the proposition that will no doubt be renewed at the end of all the testimony, as to the interpretation and the intention of Congress of the Lever Act, what effect this had upon the passing of the Lever Act and the consideration to be given to it by the court, what

75 Congress had in mind when it used the word "contract"—whether it should have a retrospective or prospective aspect.

While Your Honor has passed upon it, we wish to renew our motion at the end of the evidence. It may have an important bearing. We could not ask that question before because it was not before the court, but if it is in evidence it would be before the court to pass upon the evidence as it will be renewed in its supplementary form.

Mr. Cramer: This is being introduced to show why the twenty-

five cents was fixed, in mitigation of any guilt that might be later determined in this case, and we have a man here to identify——

The Court: That would hardly be a matter for the jury, Mr. Cramer. The present thing before the court is to submit the question of the proof of the indictment before the jury, the competent evidence. The question of mitigation would hardly be for consideration at this time, would it? It is not like a civil——

Mr. Cramer: The court, in its announcement of its decision this noon, stated he took official knowledge of a certain custom of a certain coal field, and the witness we have to testify as to the Lane-Peabody agreement. We expect to prove it was the custom of the entire coal trade that on contracts entered into under the Lane-Peabody agreement and not sold prior to August 23rd, that the twenty-five cents was charged by the entire trade.

The Court: It doesn't seem to me that the document is competent, and the objection will be sustained.

Mr. Graydon: We will offer what is conceded to be a correct copy of the Lane-Peabody agreement, and mark it "Defendant's Exhibit B."

The said document is thereupon marked for purposes of identification as "Defendant's Exhibit B" and is submitted herewith.

Thereupon the jury were returned into the jury box, and the trial proceeded as follows:

FRANK C. DECKEBACH, called as a witness on behalf of defendants, having been first duly sworn, testified as follows:

Examined by Mr. Graydon:

Q. What is your business, Mr. Deckebach?

A. Certified public accountant.

Q. How long have you been engaged in the business of public accounting?

A. Twelve years.

Q. You have an office in Cincinnati?

A. Yes, sir.

Q. I will ask you whether you went over the books and papers and other information, or had the investigation made under your direction, of the selling department, of the department of The Matthew Addy Company which is in the business of selling coal and coke, whether you got those figures for the year 1917?

A. Yes, sir.

Mr. Roudebush: I object.

The Court: Well, he might answer whether he did or not.

A. Yes, sir.

Q. Did you make a statement showing the cost to that company of selling coal and coke by months during that year?

Mr. Roudebush: I object, Your Honor.

A. Yes, sir.

The Court: He may answer whether he did or not. It isn't an important question yet.

Q. Have you the statement with you?

A. No, sir, but I think my—I think——

Q. (Handing document to witness.) I will ask you whether this is the statement that you made, that was made up under your supervision?

A. Yes, sir.

Q. Is that it?

A. Yes, sir.

Q. I want to direct your attention to the figures for September, 1917——

Mr. Roudebush: I object, Your Honor.

Q. —and I will ask you what the first item in that month, of coal, 25,315, means?

The Court: I suppose now you are attempting to prove what was stated in the opening concerning the cost of making sales——

Mr. Graydon: Yes, sir.

The Court: —in this month. I will hear from counsel for defendant on the subject. I understand, I think, what you expect to prove.

Mr. Graydon: Yes. Well, we expect to prove, if Your Honor please, that this gross margin——

The Court: I understand what you expect to prove; I believe 77 I have that in mind from the opening statement.

Mr. Graydon: I thought Your Honor asked me.

The Court: No, I am asking the legal phase of the question, what are the claims of the contention?

Mr. Graydon: Our contention is that if the order of the President by itself or under authority of the act of Congress, provided or was intended to provide that The Matthew Addy Company must sell its coal through that department at a loss, that the order and the act of Congress are both unconstitutional and a violation of the Fifth Amendment of the Constitution of the United States, and we propose to produce the evidence to show the fact which would be the basis of the argument of unconstitutionality. And whether it is as interpreted by the court already—as I understand, the ruling on the demurrer is to the effect that the Government doesn't have to show that this twenty-five cents added to the purchase price included any profit; as I understand the construction of the court, the court, in my humble view, has entirely misconstrued the plain, ordinary meaning of the word "profit." "Profit" means profit, as I understand it; it means what is left after you pay the expenses. But I understand that the court has said that the Government is at liberty to insert that word "profit" in an indictment and to allege in the indictment that the company made a profit in excess of fifteen cents, and to relieve the Government of any requirement of offering any proof in support of that allegation. Now, we propose to show the negative. If that allegation is to be left in the indictment, and the Government is relieved of proof, we propose to show, as a matter

fact, that the fifteen cents did not cover the cost. I submit to your Honor that it is competent unless the act of Congress and the order of the President proposes to confiscate the services and the property of this defendant under an act which is supposed to deal with profiteering and causes a fine of five thousand on twenty-three counts, and possibly send somebody to jail, when they didn't make a cent of profit.

Mr. Roudebush: Your Honor, I object to these statements before the jury, under the court's ruling.

Mr. Graydon: I am stating what the evidence will propose to show, Mr. Roudebush.

Mr. Roudebush: The court has already ruled on the point.

Mr. Graydon: I don't know that the court has already ruled on it. I suppose if the court has, the court will advise us.

The Court: Just let us proceed. The question of the constitutionality of the act has been before the court, and the opinion of the court upon that subject has been expressed. Congress had the right, under the circumstances and in the exigencies of the war, to delegate to the President of the United States the power to fix prices and prescribe regulations for the production and distribution of coal. Public danger justifies the substitution of executive process for judicial process. Under such circumstances executive process is the equivalent of judicial process. When the President promulgated the regulation in question it was, therefore, promulgated in the process of law. The priority of the regulation promulgated by the President is not open to question. The regulation promulgated by the President in accordance with the act had the force and effect of law. Now, it is like a railroad rate, duly promulgated—it is not open to anyone to say that in any particular transaction, or in any month of transactions, the rate prescribed did not prove profitable to him. It is the rate that was prescribed by the Government of the United States in accordance, as has heretofore been held by the court, with due process of law; therefore, it is not for us to inquire whether, in this particular instance or in this particular month, and in this particular coal jobber, the rate prescribed was a profitable one or not. The rate was binding upon all upon its promulgation. Accordingly, the evidence now proposed to be given as to the cost to this particular company, selling coal at this particular time, is not incompetent, and the objection to this will be sustained.

Mr. Graydon: Note an exception. And now, if Mr. Roudebush doesn't want the jury to hear this, I suggest they might go out. It will be quite long and I don't know that I can whisper it so they can't hear it. I will try to, though.

The Court: Very well; you may state it to the stenographer. I don't know that the jurors will hear it. If they do, I don't think they will pay any attention except to what I admit to them.

Mr. Graydon: Exception noted on behalf of both defendants in respect to each count, and the defendants state that if permitted to answer, the witness would testify that in the month of September, in respect to gross sales of coal in the month of September, 1917, they amounted to 25,315 tons.

(At this point one of the jurors left his seat in the jury box, and thereupon the court excused the jury temporarily and they retired from the court room.)

That he had set off against the total sum of money received therefor all items of expense, to-wit, the net-direct expenses for coal sales, the net overhead expenses properly chargeable against coal sales, the coal sales expenses of the Chicago branch, and the total expenses of net and overhead of the Chicago branch, and dividing the remainder by the number of tons found that the cost of coal sales in cents per ton for said month was seventeen cents nine mills. Upon the same computation for the month of October, 1917, that the cost of coal sales in cents per ton per month was eighteen and twenty-two one-hundredths cents; that applying the same computation to all coal sales of said company for the year of 1917 he found the average selling cost to be eighteen and ninety-five one-hundredths cents. That further, for the year 1918, the average cost of actual coal sales of the company, in cents per ton per month amounted to seventeen and nine one-hundredths cents. And for the year 1919 the average cost per month of actual coal sales of said company was twenty-seven and six one-hundredths cents; and for the months of January, February and March, 1920, the average cost was nineteen and thirty one-hundredths cents. And defendant offers the detailed statement prepared by the witness Frank C. Deckebach, dated May 17, 1920, covering said period from January 1, 1917, to March 31, 1920, showing all items and made as aforesaid from the original books, vouchers and other papers of said The Matthew Addy Company. And defendants' counsel states that said testimony and said analysis cost of coal sales is offered in evidence for the purpose of showing that defendant's price of three dollars and fifty cents per ton upon the sales stated in the indictments did not include a profit, as alleged in the indictment, in excess of fifteen cents per ton; and further, for the purpose of showing that said order of August 23, 1917, if it limited the gross price per ton upon the coal purchased prior to the order.

80 by defendants, to a maximum of fifteen cents, was confiscatory and compelled defendant to dispose of its product without allowance for expense and a just compensation for its services.

And further, said evidence is offered for the purpose of showing that said order so interpreted did not conform to the act of Congress, and especially Paragraph 15 of Section 25 thereof, which provides that "in fixing prices for dealers the commission shall allow the cost to the dealer and shall add thereto a just and reasonable sum for his profit in the transaction."

And in connection with said evidence defendants, and each of them, rely upon the grounds of unconstitutionality in respect to said act of Congress and said order of the President heretofore set up and relied on upon the motions to quash and demurrers to the indictments.

The statement referred to in the testimony of the witness Frank C. Deckebach is submitted herewith, marked for purposes of identification "Defendants' Exhibit C."

Thereupon the jury were returned into the jury box, and the trial proceeded as follows:

ROBERT A. COLTER being called as a witness for defendant stated he had been in the coal and coke office for about thirty years and was familiar in 1918 with the publication known as the National Coal Jobbers' Association Bulletin. Witness in 1917 and 1918 had been president of the Cincinnati Coal Exchange, a branch of the Cincinnati Chamber of Commerce. The bulletins of the National Coal Jobbers' Association were not published until the organization of that association which was several months after August 1, 1917. There were no such publications in August or September, 1917. On cross examination, the witness stated the purposes for which the National Coal Jobbers' Association was formed, and that the time was not earlier than three months after August 23, 1917. Mr. B. N. Ford was a member of that association.

Thereupon the witness Robert A. Colter retired from the witness stand.

Mr. Graydon: That's all, Your Honor.

The Court: Has the Government anything further?

Mr. Roudebush: No, Your Honor.

The Court: Proceed to the jury.

Mr. Graydon: We renew the motions heretofore made at the close of the Government's case, each and all of them, in respect to all the counts, and on the grounds stated in the motions to quash and the demurrers and in support of said motions.

Overruled and exceptions noted.

The Court: Same rulings, respectively.

Mr. Samuels: May we reopen the question that was presented this morning to Your Honor on the interpretation of that Paragraph 1? There is an additional argument Mr. Cramer wishes to make. Your Honor will permit us to reopen.

The Court: On what subject?

Mr. Samuels: The interpretation of the word "contract"—a question of statutory construction. I think Mr. Cramer has something additional to state.

The Court: I will be very glad to hear from either of the counsel if they have anything further to say with regard to construction.

Mr. Samuels: I will ask that the jury be dismissed.

The Court: You may proceed if there is anything further to be said upon it.

Mr. Cramer: Mr. Graydon covered my argument that I intended to make, in his reargument after lunch.

Mr. Graydon: Will you hear from Mr. Samuels?

The Court: Yes.

Mr. Samuels: I ask that the jury be dismissed.

Thereupon the jury retired from the court room.

Mr. Graydon: Defendants called attention and suggested to offer in evidence the order of the President of August 21, 1917, fixing bituminous coal prices, and the order of August 23, 1917, fixing anthracite coal prices, and defining jobbers and fixing their commissions,, and the order of September 6th——

The Court: Wouldn't you say their margins, rather than commissions?

Mr. Graydon: Yes, their margins; and the order of September 6, 1917, issued by the United States Fuel Administrator, and the order of October 6, 1917, of the Fuel Administrator, and the court stated that for the purposes of this case they would be noticed judicially.

Thereupon Mr. Samuels proceeded with his argument to the court, after which the jury were returned into the jury box and the following proceedings were had:

Mr. Graydon: If Your Honor please, we have some charges that we would like to have given specially or in the charge. I don't think there is anything new that Your Honor hasn't passed on (charges handed to the court).

82 The Court: The first will be refused.

Mr. Graydon: Note an exception.

The Court: The second will be refused.

Mr. Samuels: Exception.

The Court: The third will be refused.

Mr. Samuels: Exception.

The Court: The fourth will be refused.

Mr. Samuels: Exception.

The Court: The fifth will be refused.

Mr. Samuels: Exception.

The Court: The sixth will be refused.

Mr. Samuels: Exception.

The special charges requested by counsel for defendants refused by the court are as follows:

SPECIAL CHARGE No. 1.

There have been produced in evidence two contracts entered into by The Matthew Addy Company with the Bluefield Coal & Coke Company dated July 31st, 1917, in which 80 cars of coal were contracted to be purchased.

If you find from the evidence that the sales of coal made by the defendants which are complained of in the indictment were sales of the same coal contracted for purchase from the Bluefield Coal & Coke Company on July 31st, 1917, then such sales are exempted from the Act of Congress of August 10th, 1917, which law is known as the "Lever Act" and I therefore charge you as a matter of law that you must return a verdict of "Not Guilty."

SPECIAL CHARGE No. 2.

If you find from the evidence that the gross margin of 15 cents per ton for jobbers as fixed by the President on August 23rd, 1917 does not include defendants' costs of doing business and a just and reasonable sum for profit, then I charge you as a matter of law that you must return a verdict of "Not Guilty."

SPECIAL CHARGE No. 3.

The purpose of the Lever Act upon which the indictments in these cases are found is to prevent the making of unreasonable profits in the sale of coal. What is a reasonable or unreasonable profit is for you to determine from all the evidence and all the circumstances of the cases and if you find from the evidence that the defendants did not make any unreasonable profits in the sales of coal complained of in the indictments, then I charge you that you must return a verdict of "Not Guilty."

SPECIAL CHARGE No. 4.

The order of the President of August 23, 1917 part of which is set forth in the indictment, applied only to jobbers and only in respect to coal dealt in by them, both bought and re-sold, after the issuance of the order of August 23, 1917; and unless the jury find, beyond reasonable doubt, that the coal covered by the indictment was purchased by defendant The Matthew Addy Company after August 23, 1917, they shall find defendants, and each of them, not guilty.

SPECIAL CHARGE No. 5.

The Act of Congress contemplates that a jobber, for the buying and selling of coal, should be entitled to his expenses and a just compensation for his services, and unless the jury should find, that the order of August 23, 1917, provided for and allowed such expense and compensation, they shall find defendants, and each of them, not guilty.

SPECIAL CHARGE No. 6.

The indictment charges in each count that the price of \$3.50 per ton demanded and received by the defendant The Matthew Addy Company, included a profit or gross margin of 25 cents per ton, which was in excess of the profit or gross margin of 15 cents per ton fixed by said order of August 23, 1917. Profit, in these indictments, means the amount of sum remaining after the deduction of all cost and expense; and I charge you, that unless you find beyond a reasonable doubt, that said sum of 25 cents per ton added by defendant The Matthew Addy Company to its purchase price of \$3.25

per ton, included a profit, as above defined, in excess of 15 cents per ton, you shall find defendants and each of them not guilty.

Thereupon, after counsel for both sides had completed their arguments to the court and jury, the court charged the jury, as follows:

84 The Court: Gentlemen of the jury, it becomes now my duty to charge you as to the law in this case. The law as I charge it to you is binding upon you; you must take the law from the court. You are the sole judges of the facts. Applying the law as I shall give it to you to the facts as you find them to be from the evidence, you will reach your conclusion in this case.

The Congress of the United States, by a law approved August 10, 1917, enacted for the purpose of the national security and defense during the recent war, provided that the President should be, and he was, thereby authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke wherever and whenever sold, either by producer or dealer, and to establish rules for the regulation of, and to regulate, the method of production, sale, shipment, distribution, apportionment or storage thereof among dealers and consumers, domestic and foreign. And pursuant to this authority so conferred upon him by the Congress of the United States, the President of the United States did, on the 23rd day of August, 1917, promulgate certain regulations relating to the supply of fuel, among others, as follows:

"A coal jobber is defined as a person (or other agency) who purchases and resells coal to coal dealers or to consumers without physically handling it on, over, or through his own vehicle, dock, trestle or yard.

For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of 15 cents per ton of 2,000 pounds."

You are considering now two cases simultaneously, each upon the evidence now before you. All of the evidence now before you is applicable, so far as it pertains thereto, to each of the indictments now being tried.

The first is against the defendant The Matthew Addy Company; the second is against the defendant Benjamin N. Ford. What I shall say generally to you has reference to each of these indictments and to each count thereof.

The presumption is that the defendant, that is to say each defendant, is innocent, and this presumption follows until it is overthrown by evidence of his guilt beyond a reasonable doubt. He is presumed to be innocent until he is proven guilty, so that you will

85 begin your deliberations upon that basis, remembering that the mere fact that a defendant has been indicted by the grand jury in and of itself raises no presumption of the guilt of the defendant. One charged with the commission of an offense can be convicted only upon the evidence produced at his trial.

The burden of proof is upon the Government of the United States to prove the crime charged as to each count of these indictments,

to prove the crime charged and all its essential elements, beyond a reasonable doubt. By a reasonable doubt is meant this: When you lack an abiding conviction to a moral certainty of the truth of the charge, considering all the evidence, then you have a reasonable doubt. A reasonable doubt is an honest uncertainty. If you have an honest uncertainty then you have a reasonable doubt. It is not a mere captious doubt, such as might, by some process of ingenuity, be raised in the mind; to be a reasonable doubt it must be an honest uncertainty.

So far as circumstantial evidence is considered, each circumstance must be proven beyond a reasonable doubt, and the consequences must flow naturally from the circumstances thus established.

Now, what are the essential elements of the indictments which you have under consideration?

As to the indictment against The Matthew Addy Company, the law is set forth in the first count; but the law you will take from the court as I give it to you. The presidential order is set forth, but I have already charged you as to the existence of the presidential order, and that you will assume to be established, for that presidential order has the force of law, and it is, so far as your consideration of this case is concerned, a law, and you will assume it to be so.

The indictment states that The Matthew Addy Company was, in the months of September, October and November, 1917, a corporation organized and existing under the laws of the state of Ohio. That has been admitted by the defendant The Matthew Addy Company, so that you may assume that that is proven to be true. And that it was conducting, within the jurisdiction of this court, the business of a coal jobber. That likewise has been admitted, and of that no question is made. That continuously, during the months of September, October and November, 1917, a state of war existed between the United States of America and the Imperial German Government and its allies, and the law, orders and regulations above referred to were in full force and effect. As to the existence of the war you need no proof of that; the court takes judicial notice, and you will therefore know, as you do know in your own minds, that the war was then in existence. The indictment then charges, taking the second count, the first count having been dismissed, that on or about the 7th day of September, in the year 1917, in the city of Cincinnati, county of Hamilton and state of Ohio, and within the jurisdiction of this honorable court, The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Fred R. Kluckhohn, doing business in Naperville, Illinois—that is an essential averment—for a certain quantity of bituminous coal, to-wit, about 49.85 tons of 2,000 pounds each of Pocahontas run-of-mine coal—that is an essential averment, but it is not necessary that the quantity should be precisely that charged in the indictment—a price of three dollars and fifty cents per ton F. O. B. at the mines producing said coal—that is an essential averment—which said price of three dollars and fifty cents per ton included a profit or gross margin to it, the said The Matthew Addy

Company, as such coal jobber, as aforesaid, of twenty-five cents per ton—that is an essential averment, and I charge you that “profit” as there used means the same as gross margin, that is, the difference between the purchase price and the selling price—which said profit or margin of twenty-five cents per ton was well known by said The Matthew Addy Company to be in excess of the profit or gross margin of fifteen cents per ton of 2,000 pounds permitted by the law, executive order or regulations above referred to, to be added to the purchase price of said jobber. That is an essential element, and it is essential for the Government to establish beyond a reasonable doubt that the defendant The Matthew Addy Company, knew of the regulation of the President which I have read to you fixing the gross margin at fifteen cents per ton. I charge you that the knowledge of its officer in control and direction of its activities as a coal jobber would be the knowledge of the corporation, if that has been shown. Such knowledge must be shown beyond a reasonable doubt. And the grand jurors further present that said The Matthew Addy Company did not have any contract with said Fred R. Kluckhohn, made 87 in good faith prior to said 23rd day of August, 1917, in which said contract the price for the purchase and sale of said coal was fixed. That is an essential averment of this indictment.

Now, gentlemen, the other counts are in the same terms. As to Counts Numbers 1 and 4, the evidence shows no offense committed within this jurisdiction, and your verdict on Counts Numbers 1 and 4 in the indictment against The Matthew Addy Company will be not guilty. Counts 3, 6, 8, 14, 19, 21, 22 and 23 are withdrawn from your consideration and dismissed, because the matters therein charged are charged also in other counts to be considered by you. You will, therefore, pass upon counts numbered 2, 5, 7, 9, 10, 11, 12, 13, 15, 16, 17, 18 and 20. I have indicated in lead pencil upon the indictment, upon the face of those counts, those which are omitted or dismissed. Count Number 2 charges a sale to Fred R. Kluckhohn, Naperville, Illinois, September 7, 1917; Count Number 5 charges a sale to The Wagner Manufacturing Company, Shelby County, Ohio, September 7, 1917; Count Number 7 charges a sale to the South End Supply Company, Chicago, Illinois, September 13, 1917; Count Number 9 charges a sale to Rice & Laub, of Batavia, Ohio, August 25, 1917; Count Number 10 charges a sale to Rice & Laub, Batavia, Ohio, September 8, 1917; Count Number 11 charges a sale to The Boye & Emmes Machine Tool Company, of Cincinnati, Ohio, September 14, 1917; Count Number 12 charges a sale to the Connersville Lumber Company, Connersville, Indiana, September 12, 1917; Count Number 15 charges a sale to Frank M. Dell, of Indianapolis, Indiana, September 15, 1917; Count Number 16 charges a sale to the Whetstone Coal Company of Cincinnati, Ohio, September 11, 1917; Count Number 17 charges a sale to D. G. McFadden Grain Company of Ridgeville, Ohio, September 24, 1917; Count Number 18 charges the sale to Kraft & Co. of Cook County, Illinois, September 13, 1917; Count Number 20 charges a sale to Frey Brothers, of Chicago, Illinois, on September 20, 1917. The same rules are applicable as to each count.

Now, as to the indictment against Benjamin N. Ford, Counts Numbers 2, 3, 4, 6 and 11 are withdrawn from your consideration and dismissed, the matters therein charged being covered by other counts. You will therefore pass upon the remaining counts, 88 Numbers 1, 5, 7, 8, 9, 10 and 12. Count Number 1 charges a sale to Frey Brothers, Cook County, Illinois, September 10, 1917; Count Number 5 charges a sale to the Wagner Manufacturing Company, Sidney, Shelby County, Ohio, September 7, 1917; Count Number 7 charges a sale to Rice & Laub, Batavia, Ohio, August 26, 1917; Charge Number 8 charges a sale to Rice & Laub, Batavia, Ohio, September 8, 1917, one of those sales to Rice & Laub being August 26th and the other September 8, 1917; Charge Number 9 charges a sale to Connersville Lumber Company, Connersville, Indiana, September 12, 1917; Charge Number 10 charges a sale to Consumers Coal & Supply Company, Elkhart, Indiana, September 13, 1917; Charge Number 12 charges a sale to Whetstone Coal Company, Cincinnati, Ohio, September 11, 1917.

The preliminary allegations in the first count of this indictment, as to the passage of the National Defense Act and the promulgation of the presidential order, which I have stated to you, are the same as in the other indictment.

It is also charged that The Matthew Addy Company was a corporation, as in the other indictment, in business as a coal jobber. It is further charged that Benjamin N. Ford, late of the said city of Cincinnati, county of Hamilton and state of Ohio, during all of said times was, and still is, the vice-president of said The Matthew Addy Company, and in such official capacity had charge, control, supervision and direction of the activities, negotiations and contracts of said company insofar as they related to the conduct of its business as a coal jobber; that continuously during the months of September, October and November, 1917, a state of war existed between the United States of America and the Imperial German Government and its allies, and the law, orders and regulations above referred to were in full force and effect.

It is an essential allegation to be proven that the said Benjamin N. Ford was vice-president, and in such official capacity had charge, control, supervision and direction of the activities, negotiations and contracts of the company insofar as they related to the conduct of its business as a coal jobber.

It is further presented that within this jurisdiction, on the 10th of September, 1917, Benjamin N. Ford, acting in his capacity as aforesaid with The Matthew Addy Company, doing business as a coal jobber, wilfully, unlawfully, knowingly and feloniously 89 did ask, demand and receive from Frey Brothers, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to-wit, about 50.30 tons of 2,000 pounds each of Pocahontas run-of-mine coal, a price of three dollars and fifty cents per ton, F. O. B. at the mines producing said coal, which said price of three dollars and fifty cents per ton included a profit or gross mar-

gin to it, said The Matthew Addy Company, as such coal jobber as aforesaid, of twenty-five cents per ton—all of that is a material and essential allegation of the indictment; those elements are all essential to be proven by the Government beyond a reasonable doubt—which said profit or margin of twenty-five cents per ton was, and was well known by the said Benjamin N. Ford, vice-president, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of fifteen cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber. That, gentlemen of the jury, is an essential element to be established beyond a reasonable doubt. It must appear that the said Benjamin N. Ford so knew, that he had knowledge of the presidential regulations fixing the margin, the gross margin of the jobber at fifteen cents per ton. And, that said The Matthew Addy Company did not have any contract with said Frey Brothers, made in good faith prior to said 23rd day of August, 1917, in which said contract the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, vice-president of said The Matthew Addy Company, as aforesaid. Those also are essential elements to be established.

Now, the other counts are in substance the same, the names of the purchasers, the exact quantities, and the precise dates of the sales, of course, varying in the different counts as they also do in the indictment against the defendant The Matthew Addy Company.

A corporation, gentlemen of the jury, acts by its officers. If the defendant The Matthew Addy Company, acting by its officer duly authorized to have charge, control, supervision and direction of the activities of said company, so far as they related to the conduct of its business as a coal jobber, was guilty of the offenses charged in the respective counts in the indictment against that company, 90 then the company itself was guilty. One who aids, abets, counsels, commands, induces or procures the commission of an offense defined in any law of the United States is himself a principal therein. And so, if an offense committed by a corporation was aided, abetted, counseled, induced, or procured by an officer thereof, the fact that the corporation may be found guilty of such an offense does not preclude the conviction of its officer; or, vice versa, the conviction of the officer does not preclude the conviction of the corporation thereon.

Now, as to each of these indictments, if you find that each of the essential elements of each count, respectively, of these indictments, as I have explained them to you, has been proven true beyond a reasonable doubt, you will find a verdict of guilty upon such counts, respectively. On the other hand, unless you do find that each essential element of a count of this indictment has been proven true beyond a reasonable doubt, then you will find a verdict of not guilty as to each count concerning which that is so, respectively.

You, gentlemen of the jury, are not concerned with the penalty to be inflicted in case the defendant is found guilty. That responsibility is upon the court. You simply have to say, upon the evidence and under the law as I have given it to you, as to each count in each of these indictments, whether the defendant has been proven guilty thereon beyond reasonable doubt or not.

You are the sole judges of the credibility of the witnesses here produced before you. You may consider, in judging their credibility, their demeanor upon the witness stand; any bias or prejudice that they may have shown, if they have shown any; their interest in the outcome of this trial, if any they have; the probability, the reasonableness of their testimony. You will give all the circumstances bearing upon their testimony consideration, and then you will accord to the testimony of each witness such credit as you find it entitled to receive. You are not necessarily, or as a matter of law, bound by the greater number of witnesses, but of course, in this case, except as to one issue, the defendant has produced but one witness. However, you are not necessarily or as a matter of law bound by the greater number of witnesses, although, of course, that is a matter for you to consider. You can not arbitrarily, and
91 without being able to give yourself a good reason therefor, reject any of the testimony of any witness.

Gentlemen of the jury, you will now take each of these cases, give consideration thereto, fairly, calmly and impartially, and when you have arrived at your conclusions you will report to the court. I will send you the list of counts which have been withdrawn from your consideration and those which still remain to be considered by you.

Is there anything further, gentlemen of counsel?

Mr. Graydon: If Your Honor please, in connection with the statement made to the jury on the issue of knowledge, that defendant produced only one witness, I would like to ask Your Honor to call attention of the jury to the fact that the Government produced only one witness.

The Court: Yes. Gentlemen of the jury, I call your attention to the fact that likewise the Government produced but one witness on the subject.

Mr. Graydon: We would like to reserve an exception to that part of the charge in which the court defined "profit" as being equivalent to gross margin, and also a general exception to the charge.

I would like, Your Honor—I would like to suggest also that Your Honor, while the court stated very clearly that it was necessary for the Government to establish knowledge of the defendant of the existence of the regulation beyond a reasonable doubt, I don't think the court made it clear that that knowledge must have existed in respect to each count at the time of the transaction in that count, respectively.

The Court: I thought I made that clear. However, gentlemen, I will amplify that charge, and say that the knowledge which must be shown of the regulation of the President must have existed at the time of the transactions related in each count respectively.

You may retire, gentlemen of the jury, and deliberate upon your verdict.

Defendants and each of them excepted to the general charge.

Whereupon the jury returned a verdict of guilty against each of the defendants upon the several counts in indictments submitted by the court to the jury, as appears of record; to which verdict each of the defendants then and there excepted, and afterwards, at said term and within the time allowed by law, each defendant filed a
92 motion to set aside the verdict and for a new trial, upon consideration whereof the court overruled said motions as also appears of record to which each of said defendants excepted.

Whereupon said defendants filed a motion in arrest of judgment upon consideration whereof the court overruled said motions, all as appears of record, to which rulings of the court the defendants and each of them excepted and thereupon the court entered judgment and pronounced sentence, as also appears of record.

And thereupon, to-wit, upon this 26th day of November, 1920, the court having heretofore by orders duly entered extended the time for preparation, signing, allowance and filing of a Bill of Exceptions to December 15, 1920, present and submit this their Bill of Exceptions and pray that the same be allowed, signed and sealed, and made a part of the record, and the assignments of error having been filed, and said bill of exceptions being found by the court to be true, the same is hereby allowed, settled, signed and sealed and made a part of the record in this case on this 26th day of November, 1920, within the time allowed as aforesaid. Peck, —.

PETITION FOR WRIT OF ERROR.

[Filed July 6, 1920.]

Defendant, The Matthew Addy Company, prays for a writ of error from the United States Circuit Court of Appeals for the Sixth Circuit to review the judgment entered and sentence pronounced against it in this proceeding on June 23, 1920, and it files herewith an assignment of errors and prays that the writ of error shall operate as a supersedeas and that it be admitted to bail pending the de-
93 termination of proceedings on said writ of error. Lawrence Maxwell, Nelson B. Cramer, Julius R. Samuels, Joseph S. Graydon, Attorneys for The Matthew Addy Company.

ASSIGNMENT OF ERRORS.

[Filed July 6, 1920.]

Defendant, The Matthew Addy Company, assigns as error prejudicial to it in the record, proceedings, judgment and sentence of the court in the above entitled cause, that the court erred:

1. In overruling and not sustaining the motion to quash the in-

dictment and each and every count thereof, which motion should have been sustained on each of the following grounds:

Said indictment and each of its several counts is insufficient in law and fact.

Said indictment and each of its several counts charges in each count several separate and distinct alleged offenses and is bad for duplicity.

Said indictment and each of its several counts charges no indictable offense under the laws of the United States.

That the averments in said indictment as to the form of same and the manner in which said offense is charged, are so vague, indefinite, uncertain, argumentative and misleading that the defendant is not properly informed of the charge against him or what he shall meet at the trial and can not prepare his defense.

That the indictment and each of its several counts, alleges
94 a violation of the orders, proclamations, publications and regulations of the President of the United States of August 21, 1917, and August 23, 1917, and those subsequent thereto, without stating what subsequent regulations, proclamations, etc., were violated.

That the indictment is not in the form of nor does it conform to the Act of Congress alleged to have been violated.

2. In overruling and not sustaining the demurrer to the indictment and each count thereof, which demurrer should have been sustained on each of the following grounds:

That the Act of Congress and the rules, regulations, promulgations and publications of the President and the United States Fuel Administrator, are indefinite, uncertain and misleading and do not clearly describe the offense.

That the Act of Congress and the rulings, regulations, etc., are unconstitutional for the following reasons, to-wit:

They violate the Fifth Amendment to the Constitution of the United States, in that defendant is deprived of his property without due process of law.

They violate the tenth amendment to the Constitution of the United States in that they interfere with the rights of the respective States, as to regulation of industries within those States.

The Act of Congress of August 10, 1917, violates Section 1, of Article 1, Section 1 of Article 2 and Section 1 of Article 3 of the Constitution of the United States in that it delegates legislative and judicial powers to the President of the United States, to the United States Fuel Administrator appointed by the President, and the Federal Trade Commission.

That the Act of Congress violates clause 1 of Sec. 8, of Article 1, and clause 11 of Section 8, of Article 1 of the Constitution of the United States in that, it is an abuse of the power given to Congress to provide for the national security and defense.

The ruling of the President of the United States under date of October 6, 1917, violates clause 3 of Section 9 of Article 1 of the Constitution of the United States in that it is an ex post facto law.

3. In sustaining the objection of counsel for the Government to defendant's offer to prove that the profit of The Matthew
95 Addy Company upon each and every transaction upon which the indictment and the several counts thereof were based was not in excess of 15 cents per ton of 2,000 lbs.

4. In overruling and not sustaining defendant's motion at the close of the Government's evidence to dismiss the cause and discharge defendant.

5. In overruling and not sustaining defendant's motion at the close of all the evidence to instruct the jury to return a verdict for defendant.

6. In charging the jury that the word "profit" in the indictment, at each of the places where said word appears was the equivalent of the words "gross margin," and in charging the jury that they might return a verdict against defendant in the absence of proof that The Matthew Addy Company made a profit per ton on the coal covered by the indictment in excess of 15 cents.

7. In charging the jury that defendant might be found guilty for violation of the order of the President of August 23, 1917, although the undisputed evidence showed that in respect to each transaction covered by the indictment the coal had been purchased by The Matthew Addy Company prior to that day and prior to August 10, 1917.

8. In overruling the motion for a new trial.

9. In overruling the motion in arrest of judgment when the same should have been sustained on each of the grounds stated therein in respect to each of counts 2, 5, 7, 9, 10, 11, 12, 13, 15, 17, 18 and 20, on which defendant was found guilty, which grounds were as follows:

The provisions of the Act of Congress of August 10, 1917, 40 Stat., 276, known as the National Defense (Lever) Act, and especially Sections 1, 2, 3, 4 and 25 thereof, and the promulgation of the order of the President issued August 23, 1917, and especially Sections 1 and 2 thereof, are, as construed and applied by the judgment of the court, unconstitutional and void, in that they attempt to create offenses and impose penalties repugnant to the Constitution of the United States, especially Section 1 of Article 1, Section 1 of Article 2 and Section 1 of Article 3; and to the provisions of the Fifth Amendment that no person shall be deprived of life, liberty and property without due process of law; and to the provisions of the Sixth Amendment that in all criminal cases the accused is entitled
to be informed of the nature and cause of the accusations

96 against him; and to the Tenth Amendment reserving to the States, or to the people thereof, powers not delegated to the United States; and to Clause 1 of Sec. 8 of Art. 1; and Clause 11 of Sec. 8 of Art. 1 of the Constitution of the United States.

The averments of each of said counts are too general, vague, uncertain and indefinite to state an offense, or to inform defendant of the nature and cause of the accusation or to apprise him, with such reasonable certainty of the offense with which it is charged, and which it may be expected to meet on a trial, as to enable him to make his defense.

Each of said counts undertakes to charge separate and distinct offenses, and is bad for duplicity.

Upon certain of said counts, conviction was had for acts committed outside the jurisdiction of the court.

10. The District Court erred in entering final judgment against defendant.

Wherefore defendant prays that the judgment of the District Court may be reversed. Lawrence Maxwell, Nelson B. Cramer, Julius R. Samuels, Joseph S. Graydon, Attorneys for Defendant, The Matthew Addy Co.

ORDER ALLOWING WRIT OF ERROR.

[Filed July 6, 1920.]

This sixth day of July, A. D. 1920, came the defendant The Matthew Addy Company, by its attorneys, and filed herein and
97 presented to the court its petition praying for the allowance of a writ of error from the United States Circuit Court of Appeals for the Sixth Circuit, to operate as a supersedeas, and filed therewith assignments of error.

On consideration whereof the court allows and signs a writ of error as prayed for to operate as a supersedeas. Peck, J.

WRIT OF ERROR.

[Filed July 6, 1920.]

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial District, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the Southern District of Ohio, Greeting:

Because of the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you or some of you, between The United States of America, plaintiff, and The Matthew Addy Company, defendant, a manifest error hath happened, to the great damage of said The Matthew Addy Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth
98 Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the 5th day of August next, in the said Circuit Court of Appeals, to be then and there held,

that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals, may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 6th day of July in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States of America the one hundred and forty-fifth. —
—, Clerk of the District Court of the United States for the Southern District of Ohio.

Allowed by Peck, J., Judge U. S. District Court, S. D. O.

CITATION.

[Filed July 6, 1920.]

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, on the 5th day of August next, pursuant to a Writ of Error, filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, wherein The Matthew Addy Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 6th day of July, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States of America the one hundred and forty-fifth. Peck, Judge U. S. District Court S. D. O.

Service of the within Citation hereby acknowledged this 6th day of July, 1920. James R. Clark, U. S. Attorney S. D. O., by Thos. H. Morrow, Asst. Dist. Attorney.

ORDER EXTENDING TIME.

[Filed July 6, 1920.]

On application of defendant The Matthew Addy Co., it is ordered that the writ of error from the United States Circuit Court of Appeals for the Sixth Circuit allowed upon his petition shall operate as a supersedeas, that the time for making return to said writ of

Orders Extending Time.

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error and for the filing and allowance of a bill of exceptions be extended to October 1, 1920, and that said defendant remain at liberty under the recognizance heretofore entered into by it, for its appearance before this court from day to day as the court may require, pending the determination of proceedings on said writ of error.
Peck, J.

ORDER EXTENDING TIME.

[Filed September 25, 1920.]

Upon application of defendant and for good cause shown the time for making return to the writ of error and for filing and allowance of a bill of exceptions is extended to November 1, 1920.

ORDER EXTENDING TIME.

[Filed October 29, 1920.]

Upon application of the defendant and for good cause shown, the time for making return to the Writ of Error and for filing and allowance of a Bill of Exceptions is extended to December 15, 1920.
Peck, J.

ORDER EXTENDING TIME.

[Filed December 13, 1920.]

On application of defendant and for good cause shown, the time for making return to the writ of error is extended from December 15th to December 22d, 1920.

PRAECIPE.

[Filed November 26, 1920.]

To the Clerk:

The defendant, The Matthew Addy Company desires the following matters incorporated into the record:

Indictment.

Motion to Quash Indictment.

Order overruling motion to quash indictment.

Demurrer to indictment.

Order overruling demurer to indictment.

Verdict.

Bill of exceptions and exhibits.

Motion for a new trial.

Order overruling motion for a new trial.

Motion in arrest of judgment.

Order overruling motion in arrest of judgment.

Sentence.

Bond.

Petition for writ of error and writ of error.

Assignment of errors.

Order allowing writ of error.

Citation on writ of error.

Order of July 6, 1920, extending time of making return to
102 writ of error and for filing and allowance of bill of exceptions
to October 1st.

Order of September 25, 1920, extending time for making return
to writ of error and for filing and allowance of bill of exceptions
to November 1, 1920.

Order of October 29, 1920, extending time for making return
to writ of error and for filing and allowance of bill of exceptions to
December 15, 1920.

Opinion on motion to quash, Feb. 26, 1920.

Opinion on demurrer of May 29, 1920.

Opinion on motions for new trial June 23, 1920. Maxwell &
Ramsey, Attorneys for The Matthew Addy Company, Defendant.
November 26th, 1920.

Service of a copy of the foregoing præcipe is hereby acknowledged.
Allen & Roudebush, —.

EXHIBITS.

GOVERNMENT EXHIBITS.

1. Coal order dated July 31, 1917, No. 5668, The Matthew Addy
Co. to Bluefield Coal & Coke Company, 40 cars R. O. M. coal @
\$3.25 per ton, 2,000 pounds f. o. b. mines.

2. Coal order dated July 31, 1917, No. 5667, The Matthew Addy
Co. to Bluefield Coal & Coke Company, 40 cars R. O. M., \$3.25
per ton 2,000 pounds f. o. b. mines.

3. Invoice dated November 9, 1917, The Matthew Addy Co. to
Boye & Emmes Machine Tool Co. Red Ash Pocahontas
103 lump coal, weight 118,300. Net amount \$207.03.

4. Cancelled check drawn to order of The Matthew Addy
Co. by The Boye & Emmes Machine Tool Co. dated December 4,
1917, in amount of \$207.03.

5. Freight bill dated November 19, 1917, covering N. & W. car
85558, to Boye & Emmes Machine Tool Co., R. O. M. coal,
weight 115,300, freight \$73.54, war tax \$2.22, collectible \$76.16.

6. Invoice dated October 1, 1917, The Matthew Addy Co. to
Whetstone Coal Co., 1 car Pocahontas R. O. M. coal, weight 85,400,
net amount \$149.45.

7. Check (cancelled) drawn to order of Matthew Addy Company
by Whetstone Coal Co., dated November 1, 1917, in amount of
\$149.45.

8. Acceptance of order, addressed to Whetstone Coal Co. by The
Matthew Addy Co. dated September 11, 1917, 1 car grade R. O. M.,
price \$3.50 per ton of 2,000 pounds f. o. b. cars mines.

9. Invoice dated September 25, 1917, from The Matthew Addy Co. to Rice & Laub. Pocahontas lump coal, weight 99,500, net \$174.13.

10. Memorandum dated September 8, 1917, 2 R. O. M. \$3.50 mines.

11. Post card notice addressed to Rice & Laub, Batavia, Ohio, dated September 26, 1917, signed by The Matthew Addy Company, 1 car Pocahontas.

12. Invoice dated October 22, 1917, The Matthew Addy Company to Alexander Lumber Co., 1 car Pocahontas R. O. M. coal, net amount \$177.63.

13. Confirmation of order from Alexander Lumber Co. to The Matthew Addy Co., 1 50 ton car genuine No. 3 Pocahontas mine run coal @ \$3.50, billing price \$6.75.

14. Invoice dated October 26, 1917, The Matthew Addy Company to Frank M. Dell, 1 car grade smokeless Red Ash R. O. M. coal, weight 100,300 pounds, net amount \$175.63.

15. Cancelled check drawn to order of The Matthew Addy Company by Frank M. Dell, dated November 9, 1917, in amount of \$175.53.

16. Acceptance of order, dated September 17, 1917, from The Matthew Addy Company to Frank M. Dell, 2 cars grade R. O. M., price \$3.50 per ton 2,000 pounds, f. o. b. cars mines.

17. Acceptance of order, dated September 24, 1917, from The Matthew Addy Co. to D. G. McFadden Grain Co., 1 car grade R. O. M., price \$3.50 per ton of 2,000 pounds, f. o. b. mines.

18. Invoice dated October 22, 1917, from The Matthew Addy Co. to Kraft & Company, 1 car Pocahontas R. O. M. coal, weight 105,000 f. o. b. mines, price \$3.50, net amount \$183.75.

19. Invoice dated October 24, 1917, from The Matthew Addy Co. to Kraft & Co., 1 car Pocahontas R. O. M. coal, weight 101,200, f. o. b. mines, price \$3.50, net amount \$177.10.

20. Acceptance of order, dated September 11, 1917, The Matthew Addy Co. to Frey Bros., 4 cars grade R. O. M., price \$3.50 per ton 2,000 pounds, f. o. b. mines.

21. Invoice dated November 13, 1917, from The Matthew Addy Co. to Frey Bros., 1 car Pocahontas R. O. M. coal, weight 100,000, f. o. b. mines, price \$3.50, net amount \$175.

22. Invoice dated November 8, 1917, from The Matthew Addy Co. to Frey Bros., 1 car Pocahontas R. O. M. coal, weight 102,500, f. o. b. mines, price \$3.50, net amount \$179.38.

23. Invoice dated October 25, 1917, from The Matthew Addy Co. to Frey Bros., 1 car Pocahontas R. O. M. coal, weight 84,700, f. o. b. mines, price \$3.50, net amount \$148.23.

24. Invoice dated October 8, 1917, from The Matthew Addy Co. to Frey Bros., 1 car Pocahontas R. O. M. coal, weight 84,700, f. o. b. mines, price \$3.50, net amount \$148.23.

26. Cancelled check drawn to order of The Matthew Addy Co. by Frey Bros., dated December 3, 1917, in amount of \$324.28.

27. Freight bill dated October 29, 1917, covering N. & W. Car

53,572, addressed to Frey Bros. Co. by P. C. C. & St. L. R. R. Co., weight 100,000 pounds, \$115.25.

28. Freight bill, P. C. C. & St. L. R. R. Co., to Frey Bros., covering N. & W. Car 53,572, dated October 28, 1917, 100,000 pounds, \$10.06.

29. Freight Bill, P. C. C. & St. L. R. R. Co. to Frey Bros., covering N. & W. Car 47,919, dated November 5, 1917, weight 84,700, total \$93.17.

30. Freight bill, P. C. C. & St. L. R. R. Co. to Frey Bros., dated November 4, 1917, covering N. & W. Car 47,919, weight 84,700, amount \$2.18.

31. Freight bill, P. C. C. & St. L. R. R. Co. to Frey Bros., dated November 19, 1917, covering N. & W. Car 74,444, weight 102,500, amount \$116.13.

32. Freight bill, P. C. C. & St. L. R. R. Co. to Frey Bros., dated November 19, 1917, covering N. & W. Car 74,444, 102,500 pounds, amount \$2.64.

33. Freight bill, P. C. C. & St. L. R. R. Co. to Frey Bros., dated November 26, 1917, covering N. & W. Car 73,367, 120,000 pounds, amount \$113.30.

34. Freight bill, P. C. C. & St. L. R. R. Co. to Frey Bros., dated November 27, 1917, covering N. & W. Car 73,367, 100,000 pounds, amount \$2.58.

106 35. Invoice dated November 12, 1917, from The Matthew Addy Co. to F. R. Kluckhohn, 1 car Pocahontas R. O. M. coal, weight 85,400, price \$3.50 mines, net amount \$149.45.

36. Invoice dated October 6, 1917, from The Matthew Addy Co. to F. R. Kluckhohn, 1 car Pocahontas R. O. M. coal, weight 99,700, price \$3.50 mines, \$174.40.

37. Acceptance of order, dated September 8, 1917, from The Matthew Addy Co. to F. R. Kluckhohn, 2 cars grade R. O. M., price \$3.50 per ton f. o. b. cars mines.

38. Cancelled check drawn to order of The Matthew Addy Co., signed by F. J. Kozlowski, dated October 9, 1917, in amount of \$154.70.

39. Invoice dated September 10, 1917, from The Matthew Addy Co. to West Pullman Fuel Co., 1 car Pocahontas R. O. M. coal, weight 88,400, price \$3.50 mines, net amount \$154.70.

40. Invoice dated November 16, 1917, from The Matthew Addy Co. to South End Supply Co., 1 car Pocahontas R. O. M. coal, weight 101,400, price \$3.50 mines, net amount \$177.45.

41. Invoice dated November 12, 1917, from The Matthew Addy Co. to South End Supply Co., 1 car Pocahontas R. O. M. coal, weight 108,800, price \$3.50 mines, net amount \$190.40.

A. Letter, The Alexander Lumber Co. to A. J. Devlin, dated Chicago, October 18, 1919.

B. (For identification only) Copy of Lane-Peabody Agreement.

C. (For identification only) Statement entitled: "The Matthew

Letter, Alexander Lumber Co. to A. J. Devlin.

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Addy Company Analysis Cost of Coal Sales January 1, 1917, to March 31, 1920."

DEFENDANT'S EXHIBIT "A."

(The Alexander Lumber Co.)

Chicago, Oct. 18th, 1919.

A. J. Devlin, Special Agt., Department of Justice, Bureau of Investigation, P. O. Box 766, Cincinnati, O.

DEAR SIR: Replying to your favor October 16th, the writer I. K. McClatchie handled the transaction referred to in our letters of October 15th and 18th with the Chicago office of Matthew Addy Co. Yours truly, The Alexander Lumber Co. I. K. McClatchie.

DEFENDANT'S EXHIBIT "B."

(For Identification.)

Department of the Interior, Office of the Secretary.

June 28, 1917.

Memorandum for the Press.

The following papers show what has been done through the co-operation of the coal operators in the matter of reasonable coal prices.

June 28, 1917.

DEAR MR. PEABODY: I feel that the present extremely high prices on coal require immediate action by the coal operators, and therefore would urge upon you that they should be reduced at once and maximum prices fixed which would apply to sales on and after July 1, 1917, and continue until such time as the investigation which you propose into costs and conditions shall warrant a reduction or increase. These prices should not be used to affect present contracts or apply to export or foreign trade. In other words the people of the United States should have, as I urged upon the operators the other day, immediate relief and knowledge of their disposition to make a reasonable price irrespective of the possibilities of obtaining higher prices. This would be regarded by the people as meeting the situation promptly and wisely if the prices materially cut those which exist. Cordially yours, Franklin K. Lane.

Mr. F. S. Peabody, Chairman, Committee on Coal Production, Council of National Defense.

Whereas under the Act of Congress approved August 29, 1916, providing that a Council of National Defense be established "for the co-operation of the industries and resources for the national security and welfare, to consist of the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture,

the Secretary of Commerce, and the Secretary of Labor," authority is given to the Council to organize subordinate bodies for its assistance and co-operation, and

Whereas, pursuant to this authority the Council of National Defense has appointed Mr. Francis S. Peabody, Chairman of and with authority to appoint a Committee on Coal Production, representative of the coal producing districts of the United States, and,

Whereas a great national emergency now exists in the fuel supply of the nation, and as the coal operators and miners of the United States desire to co-operate as closely as possible with the Government, and as the Department of the Interior, the Federal Trade Commission, and the Committee on Coal Production have given close and intelligent study to the necessities now existing.

Therefore Be It Resolved, That it is the sense of this meeting that a committee of seven for each coal producing state and an additional committee of seven appointed by the representatives of the anthracite industry be appointed by the representatives of each state now attending this convention, to confer with the Secretary of the Interior, the Federal Trade Commission, and the Committee on Coal Production of the Council of National Defense, to the end that production be stimulated and plans be perfected to provide adequate means of distribution, and, further, that these committees report forthwith to the Secretary of the Interior, the Federal Trade Commission, and the Committee on Coal Production of the Council of National Defense costs of and conditions surrounding the production and distribution of coal in each district, and that these committees are authorized, in their discretion, to give assent to such maximum prices for coal f. o. b. cars at mines in the various districts as may be named by the Secretary of the Interior, the Federal Trade Commission, and the Committee on Coal Production of the Council of National Defense.

Adopted June 28, 1917.

This Convention by resolution heretofore adopted having requested the Secretary of the Interior, the Federal Trade Commission and the Committee on Coal Production to fix a fair and reasonable price at which the several operators in the several coal districts of the United States shall sell coal; do hereby further authorize said government representatives, so named in said resolution, to forthwith issue a statement fixing a tentative maximum price which, in their judgment, is fair and reasonable as applied to the several coal districts, at which coal shall be sold from and after the first day of

July next and until the accurate costs have been ascertained and a fair and reasonable price based thereon fixed by said government agencies designated under said resolution.

To this end therefore be it resolved that the several states, here represented, do present to the chairman of this Convention a suggestion, for use by said agencies in fixing the price which the several

interests here represented feel should be the fair and reasonable price to be so tentatively fixed by the said agencies.

Adopted June 28, 1917.

June 28, 1917.

MY DEAR MR. PEABODY: I have just learned of the action of the coal operators, and I wish to express my appreciation of the generous, prompt and patriotic manner in which they have acted. They have dealt with the situation in the way that I had hoped they would, as large men dealing with a large question. They manifestly see that this is no time in which to consider primarily the opportunities which the war gives for personal aggrandizement. We must gain for each by gaining for all. The Country is in a mood for sacrifice. It is intent upon the success of the war and is willing to do everything needed to give insurance to the world against a repetition of this awful condition.

Will you not be good enough to express to the coal men my appreciation of the spirit they have shown in determining that their prices shall be reduced so that the industries of the country may not feel hampered, and the people may not feel that their spirit is broken down by the thought that this is to be a war for individual advantage instead of self-protection. I felt from the moment of my talk to them that no body of men more truly represented the high purpose to yield personal desire for general good than did they. Now I trust that we shall immediately put into concrete form the spirit of your resolution. Cordially yours, Franklin K. Lane.

Hon. F. S. Peabody, Chairman Committee on Coal Production, Council of National Defense.

Department of the Interior, Office of the Secretary.

June 28, 1917.

As a result of the conference between the mine operators, the Secretary of the Interior, Federal Trade Commissioner Fort, Chairman Peabody and the committee on coal production of the Council of National Defense, the following reductions were made to go into effect July 1 next in the prices of coal. This according to the statement of Director George Otis Smith of the Geological Survey of the Interior Department will effect a reduction to the consumers east of the Mississippi River of fifteen million dollars a month, based on the output of free coal in May of this year. These prices are maximum prices per ton of 2,000 pounds aboard the cars at mine, pending further investigation. These prices do not affect in any way contracts in existence or sales of coal for foreign or export trade.

The operators tendered to the government a reduction from these reduced prices of fifty cents per ton for coal that the government may need.

No action was taken upon anthracite prices because of the fact that these prices had already been acted upon by the Federal Trade Commission.

Twenty-five cents per net ton was fixed as the maximum price for coal jobbers' commission with only one commission, no matter how many jobbers' hands the coal may pass through.

On account of an inadequate representation of operators west of the Mississippi River, no maximum prices were fixed for coal from those districts. A supplementary statement will be issued within a few days covering prices on coal produced in those districts.

The action taken at their conference, brings about the following results:

Present prices on bituminous coal mined in Pennsylvania have ranged from \$4.75 to \$6.00. Under the ruling the price is reduced to \$3.00 for mine run and \$3.50 for domestic lump, egg and nut.

The present range of prices in West Virginia is from \$4.50 to \$6.00; price reduced to \$3.00 for mine run and \$3.50 for domestic lump, egg and nut.

The range of prices for Ohio coal has been from \$4.50 to \$5.00; prices reduced to: No. 8 district, the thick vein Hocking and Cambridge districts, \$3.00 for mine run and \$3.50 for domestic lump, egg and nut; thin vein Hocking, Pomeroy, Crooksville, Coshocton, Columbiana County, Tuscarawas County, Amsterdam-Bergholz District, \$3.25 for mine run and \$3.50 for domestic lump, egg and nut; the Massillon and Palmyra districts and Jackson County, \$3.50 for all grades of coal.

The prevailing prices in Alabama have been from \$5.50 to \$5.75; prices reduced to: Cahaba and Black Creek, \$4.00; Pratt, Jaeger and Corona, \$3.50; Big Seam, \$3.00 for all grades.

The prevailing prices for coal mined in Maryland have been from \$5.75 to \$6.00; reduced prices will be \$3.00 for mine run and \$3.50 for domestic lump, egg and nut.

The prevailing prices on coal mined in Virginia have been \$4.50 to \$5.00; reduced price, \$3.00 for mine run and \$3.50 for lump, egg and nut.

The prevailing prices on coal mined in Kentucky have been from \$4.00 to \$4.50; reduced price, \$3.00 for mine run and \$3.50 for the domestic sizes.

The prevailing prices on coal mined in Illinois and Indiana have been from \$3.50 to \$4.00; reduced price, \$2.75 for mine run and steam sizes and \$3.50 for screened domestic sizes.

The prevailing prices on coal mined in Tennessee have been from \$4.50 to \$5.00; reduced price, \$3.50 for all sizes.

At the conclusion of the conference Secretary Lane said:

GENTLEMEN: This is a very novel proceeding. I think I am within the fact when I say that no such hearing or gathering as this has ever been held in the United States before, or perhaps in the world. You are, I hope, pioneers in a good movement. I come from the land of pioneers, the far Western country, where we look back with respect and admiration and some reverence upon those who

crossed the hard and stony and waterless places to the richer spots beyond. And I hope that you will be looked back upon not only by those who succeed you in the coal business, but by the industries of the United States, with respect and admiration for the manner in which you have acted at this conference. You have responded as men should, to a call made upon you in the name of the people of the United States. You are not a removed class. You are of us.

113 You belong to the people. Most of you are men who were not born to wealth. You come up out of the soil like the rest of us and you have shown a sympathy and an understanding of your relations with the people from which you spring. That is the essential quality in democracy. Unless we can maintain in our midst always a consciousness of the source of power in this country, democracy is a failure. There is a strong contention made that this government can not so organize itself as to meet to the full the demands that are and are to be made upon it, that other forms of government in times of stress or, in fact, in any times, are more competent and more efficient, because there is the strong hand of the government above, threatening, menacing, compelling. If we in the United States are to work out our problem economic, social, as we have worked out our problem political, we must work it out in my judgment in the spirit in which you have worked—with sympathy, with recognition of those whom you serve. There is a kind of corporation in this country that we know as a public utility. A public utility is one that is at the service of anyone and must render him the kind of service that it holds out to give. In the biggest and broadest sense, each one of you in running a coal mine is managing a public utility, because the public is dependent upon you. And this world is going forward and not backward, it is going to keep its confidence in democracy, if the men who have the management of industry and the men who give direction to the thought of the country have in their hearts always the welfare of the people. The one thing that will turn us back is the exercise of arbitrary power by those who have power and who exercise it ruthlessly. You have been up against an extremely odd situation. And now you have gathered here and met that situation in man fashion. I think you have reason to be proud of what you have done. Speaking for Governor Fort and for Mr. Peabody and his Committee and for myself, we are proud of what you have done. You have said to the American people that within your power, exercising your judgment, protecting yourselves, you will not be oblivious to the rights of those whom you serve; you will, within your power, protect them. That is the spirit that makes for the success of our country. And if all the industries of the United States will have that same spirit, there will be no question as to our ability to mobilize the resources of this country and carry this war to a successful conclusion. Good sense, common sense, vision, the judgment of large-minded men—those are the things that must characterize us if we are to carry on this great venture. We must not work singly and alone, for selfish ends, in the hope of reaping rich rewards which will distinguish us merely as

men who are in industry as makers of money. We must work as the men that the papers said landed in Europe yesterday will work. We must work in companies, in battalions, in regiments, and we must have in our minds the purpose that we are going to march forward to victory, victory not for ourselves but victory for the country that is dearer to us than anything we have except our own families. This war is not a war of a day. It is not a war upon which we entered lightly. It is not a war in which any man, no matter how old he is, no matter what his resources may be, will not be compelled to play his part. We are the greatest business nation on earth, and therefore we must look to the business men of the country to lead our people in spirit. And I think that the word that comes out from this gathering will be an inspiration to the people of the country.

The Matthew Addy Company Analysis Cost of Coal Sales, January 11, 1917, to March 31, 1920.

Letter-head of Frank C. Dekebach, Certified Public Accountant,
Traction Building, Cincinnati.

May 17, 1920.

To the President and Directors of the Matthew Addy Co., Cincinnati,
Ohio.

GENTLEMEN: This is to certify that we have made an examination of the cost of coal sales of your company for the period, 115 & 116 January 1, 1917, to March 31, 1920, and that the data contained in the attached schedules, in our opinion, correctly set forth the monthly costs for the period covered. Respectfully submitted, Frank C. Dekebach, Certified Public Accountant.

(Here follow schedules, marked pages 117-122, inclusive.)

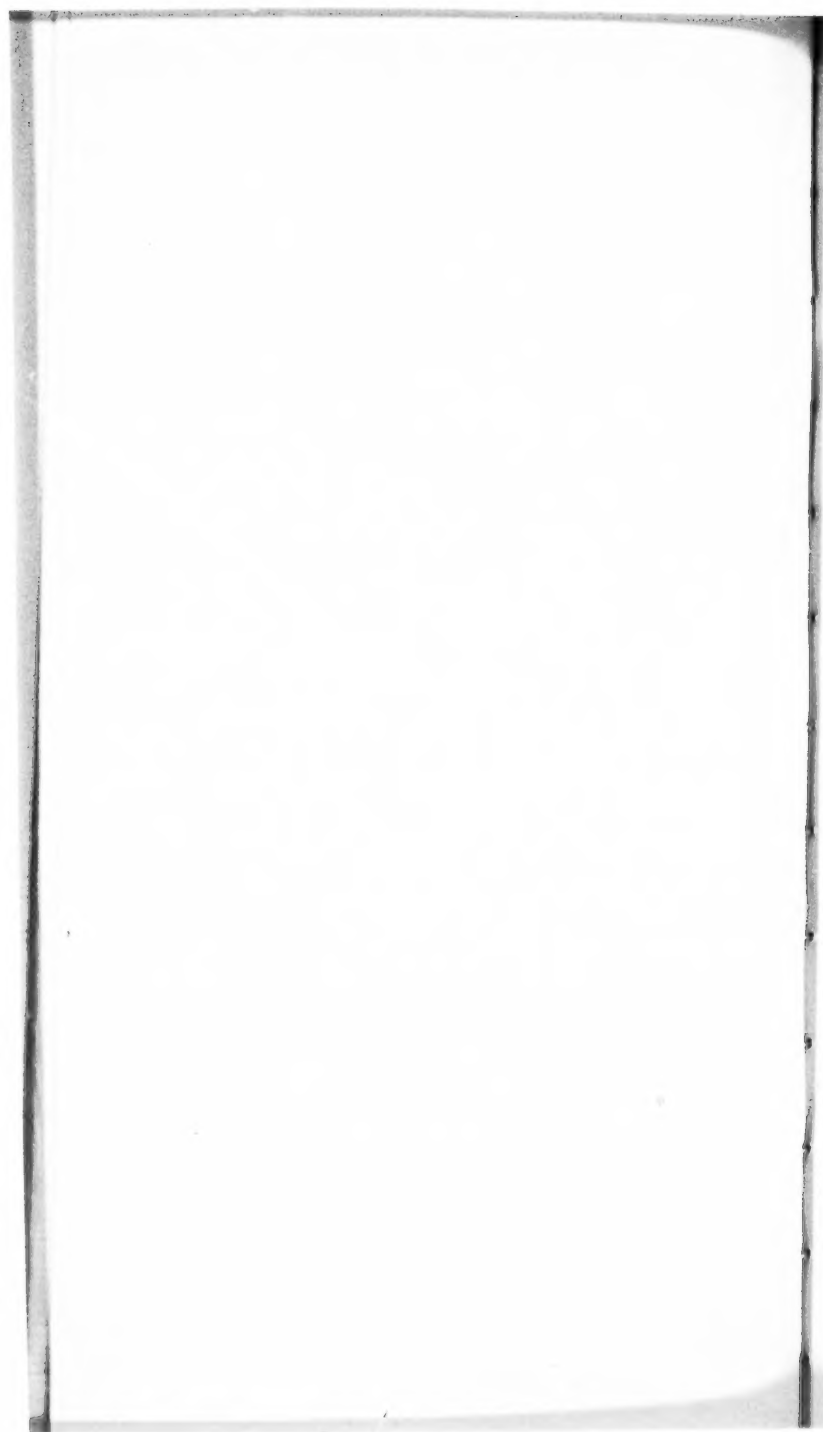
| | | | | | | Direct expenses, coal and coke. |
|-------|------|-------|------|--------|-----------|--|
| 1917 | | | | | | |
| Jan. | Coal | Ton.— | Head | Office | 24,214.00 | |
| | Coke | " | " | " | 3,936.00 | |
| | | | | | 28,150.00 | 2,834.62 |
| Feb. | Coal | " | " | " | 29,415.00 | |
| | Coke | " | " | " | 2,869.00 | |
| | | | | | 32,284.00 | 4,069.79 |
| Mar. | Coal | " | " | " | 32,745.00 | |
| | Coke | " | " | " | 2,732.00 | |
| | | | | | 35,477.00 | 5,315.40 |
| April | Coal | " | " | " | 29,331.00 | |
| | Coke | " | " | " | 3,489.00 | |
| | | | | | 32,820.00 | 4,841.70 |
| May | Coal | " | " | " | 23,107.00 | |
| | Coke | " | " | " | 2,887.00 | |
| | | | | | 25,994.00 | 4,512.11 |
| June | Coal | " | " | " | 25,814.00 | |
| | Coke | " | " | " | 3,490.00 | |
| | | | | | 29,304.00 | 3,553.37 |
| July | Coal | " | " | " | 26,780.00 | |
| | Coke | " | " | " | 4,461.00 | |
| | | | | | 31,241.00 | 7,419.57 |
| Aug. | Coal | " | " | " | 29,845.00 | |
| | Coke | " | " | " | 8,543.00 | |
| | | | | | 38,388.00 | 3,613.65 |
| Sept. | Coal | " | " | " | 25,315.00 | |
| | Coke | " | " | " | 5,529.00 | |

The Matthew Addy Company.

Statement of Tonnage and Expense of Coal Sales and Cost in Cents Per Ton.

Calendar Year 1917.

| | | Head office. | | | | | | | Total expenses, total of net direct, net overhead, Chicago branch. | Coal tonnage. | Cost of coal sales in cents per ton per month. |
|-----------|----------|---------------------------------|-----------------------|----------------------------------|-----------------------------------|--|------------------------------------|-------------------------------------|--|---------------|--|
| | | Direct expenses, coal and coke. | Less coke proportion. | Net direct expenses, coal sales. | Overhead expenses, coal and coke. | Less coke proportion on basis of relative tonnage. | Net overhead expenses, coal sales. | Chicago branch coal sales expenses. | | | |
| 24,214.00 | 3,936.00 | | | | | | | | | | |
| 28,150.00 | 2,834.62 | 432.90 | 2,401.72 | 1,080.68 | 151.20 | 929.48 | 1,021.19 | 4,352.39 | 29,822 | .1459 | |
| 29,415.00 | 2,869.00 | | | | | | | | | | |
| 32,284.00 | 4,069.79 | 418.00 | 3,651.79 | 1,277.00 | 113.29 | 1,163.71 | 840.11 | 5,655.61 | 33,984 | .1664 | |
| 32,745.00 | 2,732.00 | | | | | | | | | | |
| 35,477.00 | 5,315.40 | 416.00 | 4,899.40 | 1,312.32 | 101.05 | 1,211.27 | 851.52 | 6,962.19 | 37,777 | .1843 | |
| 29,331.00 | 3,489.00 | | | | | | | | | | |
| 32,820.00 | 4,841.70 | 427.00 | 4,414.70 | 1,374.97 | 146.09 | 1,228.88 | 533.29 | 6,176.87 | 31,255 | .1976 | |
| 23,107.00 | 2,887.00 | | | | | | | | | | |
| 25,994.00 | 4,512.11 | 426.00 | 4,086.11 | 1,276.91 | 140.46 | 1,136.45 | 660.02 | 5,882.58 | 27,599 | .2131 | |
| 25,814.00 | 3,490.00 | | | | | | | | | | |
| 29,304.00 | 3,553.37 | 416.00 | 3,137.37 | 1,856.01 | 220.86 | 1,635.15 | 535.07 | 5,307.59 | 28,064 | .1891 | |
| 26,780.00 | 4,461.00 | | | | | | | | | | |
| 31,241.00 | 7,419.57 | 300.00 | 7,119.57 | | | 2,044.53 | 573.63 | 9,737.73 | 28,432 | .3425 | |
| 29,845.00 | 8,543.00 | | | | | | | | | | |
| 38,388.00 | 3,613.65 | 462.00 | 3,151.65 | 1,135.76 | 252.70 | 883.06 | 415.55 | 4,450.26 | 30,542 | .1457 | |
| 25,315.00 | 5,529.00 | | | | | | | | | | |
| 30,844.00 | 3,898.71 | 432.90 | 3,465.81 | 970.27 | 173.87 | 796.40 | 422.64 | 4,684.85 | 26,164 | .1790 | |



Schedules Showing Cost of Coal Sales.

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123 & 124

1920.

January—Coal Tonnage—

| | |
|-------------------|-----------|
| Head Office | 32,573.00 |
| Chicago | 2,047.00 |

34,620.00

February—Coal Tonnage—

| | |
|-------------------|-----------|
| Head Office | 42,630.00 |
| Chicago | 1,237.00 |

43,867.00

March—Coal Tonnage—

| | |
|-------------------|-----------|
| Head Office | 53,028.00 |
| Chicago | 2,573.00 |

55,601.00

| | Head office. | | Chicago office. | | Total expense. | Coal tonnage. | Cost of coal sales in cents per ton per month. |
|------------------------|------------------|---------------------------------|------------------|---------------------------------|----------------|---------------|--|
| | Direct expenses. | Proportion of overhead expense. | Direct expenses. | Proportion of overhead expense. | | | |
| January—Coal Tonnage— | | | | | | | |
| Head Office | 4,317.21 | 1,905.59 | 451.74 | 119.69 | 6,794.23 | 34,620 | .1962 |
| Chicago | | | | | | | |
| February—Coal Tonnage— | | | | | | | |
| Head Office | 4,807.87 | 1,844.51 | 490.88 | 53.52 | 7,196.68 | 43,897 | .1640 |
| Chicago | | | | | | | |
| March—Coal Tonnage— | | | | | | | |
| Head Office | 6,854.06 | 4,527.99 | 406.89 | 113.78 | 11,902.72 | 55,601 | .2141 |
| Chicago | 15,979.14 | 8,278.09 | 1,349.51 | 286.99 | 25,893.73 | 134,118 | .1930 |
| | | | | | | | for 3 Months. |

3308

125

CERTIFICATE OF CLERK.

UNITED STATES

vs.

THE MATTHEW ADDY COMPANY.

I, B. E. Dilley, Clerk of the District Court of the United States for the Southern District of Ohio, do hereby certify that the foregoing pages, numbered 1 to 123 inclusive, contain a true and correct copy of those portions of the record and proceedings indicated in the precept for record, filed November 6, 1920 (found on page 103 hereof) as the same appear of record and on file in the office of the clerk of said court in the above entitled cause.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the city of Cincinnati, Ohio, this 22d day of December, 1920. B. E. Dilley, Clerk, by Harry F. Rabe, Deputy. (Seal.)

126 Proceedings in the United States Circuit Court of Appeals for the Sixth Circuit.

CAUSE ARGUED IN PART.

(March 7, 1922—Before Knappen, Denison, and Donahue, C. JJ.)

These causes are argued together by Mr. Joseph S. Graydon for the plaintiffs in error and are continued until tomorrow for further argument.

FURTHER ARGUED AND SUBMITTED.

[March 8, 1922.]

These causes are further argued by Mr. Joseph S. Graydon and Mr. Julius R. Samuels for the plaintiffs in error and by Mr. Thomas H. Morrow, Assistant United States Attorney, for the defendant in error and are submitted to the Court.

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[Title omitted.]

OPINION.

[Filed May 4, 1922.]

Submitted March 8, 1922. Decided May 4, 1922.

Before Knappen, Denison, and Donahue, Circuit Judges.

KNAPPEN, Circuit Judge: The Lever Act was approved and took effect August 10, 1917, (40 Stat., Ch. 53, p. 276). Its title declares

it "an act to provide further for the national security and defense by encouraging the production, conserving the supply and controlling the distribution of food products and fuel." By Sec. 25 the President of the United States was authorized and empowered "whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment and storage thereof among dealers and consumers, domestic or foreign," etc. Subdivision 17 of that section penalizes the violation of or refusal to conform to the regulations provided for in the section, with knowledge that they have been so prescribed. On August 23, 1917, the President adopted a series of regulations as to prices and margins to be in force "pending further investigation or determination thereof by the President." The first of these regulations defined a coal jobber as a person (or other agency) "who purchases and resells coal to coal dealers or to consumers without physically handling it on, over, on through his own vehicle, dock, trestle or yard." Regulation No. 2 forbids a jobber, for the buying and selling of bituminous coal, to add to his purchase price a gross margin in excess of 15 cents per ton. Paragraph 16 of Sec. 25 provides that the maximum price fixed and published (by the Trade Commission) shall not be construed as invalidating any contract in which prices are fixed, made in good faith, prior to the establishment and publication of maximum prices by the Commission; and on October 6, 1917, the fuel administrator made a regulation that bona fide contracts relating to bituminous coal made before the President's proclamation of August 21, 1917, should not be affected "by these proclamations."

It is conceded or established by verdict that the Matthew Addy Company was, at the time of the transactions complained of, a corporation conducting at Cincinnati, Ohio, the business of a coal jobber, as defined in the President's regulation; that Benjamin N. Ford was vice-president, and in such capacity had control and direction of the activities and contracts of the Matthew Addy Company, so far as they related to the conduct of the business as a coal jobber, and that each plaintiff in error knew of the regulation fixing the "gross margin" at 15 cents per ton. The corporation (cause No. 3517) and Ford (No. 3516) were separately indicted for making, subsequent to August 23, 1917, various specific sales of coal at a price which "included a profit or gross margin" to the corporation of 25 cents per ton, the corporation having no contract with the purchaser made in good faith prior to August 23, 1917, and with knowledge on the part of the respective defendants that such "profit or gross margin of 25 cents per ton" was in excess of the "profit or gross margin of 15 cents per ton" permitted, by the executive order and regulations referred to, to be added to the purchase price paid by the jobber. The corporation was convicted upon 13 counts of the indictment against it; Ford was convicted upon 7 counts of the indictment against

129 him. In the case of each count in each indictment on which conviction was had it was either admitted or established that

the sales were made at a gross margin of 25 cents in excess of the purchase price to the jobber; and that on August 23, 1917, the corporation had no contract for the sales in question. It appeared, however, that all the coal covered by the various counts had been purchased by the corporation previous to August 10, 1917, when the Lever Act took effect. The two cases were tried together, and were argued together in this court. In each the questions presented for review are the same.

1. Plaintiffs in error contend that inasmuch as the coal in question was bought prior to the President's order of August 23rd and the passage of the Lever Act (August 10th), and as the executive order allowed a margin of 15 cents per ton for the combined "buying and selling of bituminous coal," the penal provisions of Sec. 15 do not apply; that on August 21st the President had provisionally fixed prices of coal both at the mines and in the hands of middlemen and retailers, based upon the cost of production, and regarded as not only just fair and liberal; that the buying and selling amounted to a single transaction, and that to so construe the act as to cover a purchase previous to the executive order and the act would be contrary to the intent of the regulations, and would in given cases attribute to the President an intention to limit the jobber to a gross margin which might well be less than the expense incurred by him in the purchase thereof. This conclusion is thought to be confirmed by certain rulings in the fuel administrator's order of October 6, 1917, which are thought to indicate that it was not at that subsequent date considered an offense for a jobber who had purchased coal prior to August 23rd to sell it at any price obtainable. Plaintiffs in error invoke the proposition that penal laws are to be strictly construed, and should not be regarded retroactive unless such intention is clear.

It seems plain that the President's order of August 23rd should not be construed as excluding from its operation coal previously bought. Neither the statute nor the regulations were ordinary legislation. That they were designed to meet a real emergency is shown not only by the title of the act, but by the preamble, which asserts that the measures provided thereby for conserving the supply of food products, fuel, etc., the establishment of Government control and the issue of regulations and orders provided for, were by reason of the existence of a state of war essential to the national security and defense, for the successful prosecution of the war, and for the maintenance of the army and navy. The act was in terms made effective only until the end of the then existing war. Even ordinary remedial laws, although penal, are not to be so strictly construed as to defeat the obvious legislative intent. *Johnson v. So. Pacific R. R. Co.*, 196 U. S. 1, 17-18. We think the sole enquiry in this connection relates to the intent of the executive in making the order of August 23rd. The order must, we think, be construed as applying to all sales made subsequent to the order, regardless of the time the purchases were made. No limitation in this respect was placed by the statute upon executive action. The authority given was to fix prices of coal wherever and whenever sold. The order of August 21st followed but 10 days after the passage of

the statute. It stated that it should be in force pending further investigation. As stated by the trial judge, it was matter of public knowledge, and recognized in certain orders of the fuel administration, that the coal mine output was largely contracted to be sold in advance; that the supply of coal was to a large extent, and in a proper sense, in the hands of jobbers, when the act was passed, and that unless jobbers' margins with reference to then existing contracts of purchase were regulated it remained open to jobbers to demand what they could get for their coal, and thus carry on the injurious manipulation and private control of the supply which the act was designed to prevent. We have no difficulty in agreeing with the trial judge that the President's orders in question make clear an intention to control and prevent speculation in fuel so far as possible, and not to permit jobbers who already held contracts for mine output to be free from restriction in the disposition of the same.

2. Plaintiffs in error complain that they were not allowed to show that 15 cents per ton added as commission or gross margin to its purchase price results in this case to loss or inadequate compensation. Denial is made of the President's authority to so limit the gross margin as to accomplish that result. In this connection there is a suggestion that the President's authority can only be exercised through the Federal Trade Commission, a subject which will later be considered under another heading. It is further urged that even if the immediate emergency justified the President in fixing jobber's prices, he was subject to the limitations imposed by the act upon the Trade Commission, which (under paragraph 14) was required in fixing maximum producers' prices to "allow the cost of production, including the expense of operation, maintenance, depreciation and depletion," plus "a just and reasonable profit;" paragraph 15

131 further providing that "in fixing such prices for dealers, the Commission shall allow the cost of the dealer and shall add thereto a just and reasonable sum for his profit in the transaction." In our opinion this contention overlooks the summary nature of the power which we think was conferred on the President, to meet the emergency by making temporary orders which should, so far as possible, save the immediate situation until the Commission should have time and opportunity, through its slower processes, to make more complete investigation of conditions and remedies. It should be conclusively presumed that the President gave the subject all the investigation and consideration which the emergency permitted. It was thus not open to plaintiffs in error to show that in their specific cases the margin allowed was inadequate or resulted in loss.

3. By motion to quash the indictment it is urged that by the Lever Act the President was given no power to fix prices at which coal could be sold, but that such power rested solely in the Trade Commission. Following the broad powers given the President by paragraph 1 of Sec. 25, as quoted in part at the beginning of this opinion, is this express provision: "Said authority and power *may*¹ be exercised by

¹Italics ours.

him in each case through the agency of the Federal Trade Commission during the war, or for such part of said time as in his judgment may be necessary."

Plaintiffs in error contend that the word "may" must be construed as "shall," and that this is shown by the asserted "startling innovation in legislative action," due to the exigencies of the war, found in the authority given the President to fix prices of coal and coke and to establish rules and regulations, etc., as contained in the earlier part of the act, as well as in the provisions relating to compensation for the use of plants and businesses requisitioned, to the designation by the President of an agency to which the producers shall sell their products, etc., to procedure by the Trade Commission in enquiring into the cost of producing coal and coke, and in the requirement that the Commission, in fixing maximum prices, shall allow the cost of production or service and add thereto a just and reasonable sum for the profit in the transaction.

We are unable to agree with this contention. The district judge, in a brief but comprehensive opinion (263 Fed. 451), held that the word "may" is merely permissive; that the President was by the first paragraph of the section empowered, not required, to exercise his authority through the Commission in each instance; and that such intention was otherwise clear from the context. In this opinion we fully concur.

132 Nor do we think there was error in refusing defendants' request to charge that defendants were not liable unless the 25 cents per ton, added by them to the purchase price of \$3.25 per ton, included a profit (after the deduction of all costs and expenses) in excess of 15 cents per ton, and in charging that "profit" means the same as "gross margin," viz.: the difference between the purchase price and the selling price.

4. The constitutionality of Sec. 25 of the act is vigorously assailed on several grounds, the first being that it deprives plaintiffs in error of their property without due process of law. The specific criticisms are that the law is not clear and definite, and that no notice and hearing upon the making of executive orders is provided for. The first criticism is plainly without merit. Nothing could well be more clear and definite than the plain inhibition against making the selling price more than 15 cents per ton higher than the purchase price. The case is obviously not within the reasoning of the *Cohen* case (255 U. S. 81, 89), which held Sec. 4 of the act invalid; and the instant case is not affected by that decision. As to the second criticism: While under ordinary conditions notice and hearing would be conditions precedent to the making of an order of this kind, we agree with the court below (265 Fed. 424) that due process of law is not to be tested by form of procedure merely, that public danger warrants the substitution of executive processes for judicial process (*Mayer v. Peabody*, 212 U. S. 78, 84); and that under the war conditions then existing, and as indicated by the preamble of the act, the fixing of prices in industries so vital to the prosecution of the war as food and fuel was not the deprivation of due process of law, but is within the power given to Congress by Art. I, Sec. 8 of the Constitu-

tion, to make all laws necessary and proper for carrying into execution the war powers expressly enumerated. Our conclusion that Sec. 25 of the Lever Act is valid is confirmed by the many recent decisions of the Supreme Court sustaining the exercise of war powers; as in the McKinley case (249 U. S. 397, 398), where was sustained a regulation of the Secretary of War, made under the authority of Congress, forbidding the keeping of houses of ill fame within a certain distance of military camps; the War Time Prohibition case (251 U. S. 146, 160), holding that the exercise of the power to prohibit the liquor traffic as a means of increasing war efficiency was within the war power of Congress; *Ruppert v. Caffey* (251 U. S. 264, 279, 283, 301), which sustained the prohibition against liquors containing one-half of one per cent. of alcohol, even though not in fact intoxicating; the Selective Draft cases (245 U. S. 366, 377); the Espionage cases (*Schenck v. U. S.*, 249 U. S. 47; *Frohwerk v. United States*, 249 U. S. 204; *Debs v. United States*, 249 U. S. 211). In several of the cases cited the Lever Act is referred to, and, to say the least, without apparent question of its validity generally.

The section is further criticized as violating Arts. I, II and III of the Federal Constitution, by attempting to delegate legislative and judicial powers to the President, the fuel administrator and the Federal Trade Commission. We are unable to recognize any delegation of judicial power. In our opinion the delegation of power to make reasonable rules and regulations for the control of the food and fuel supply did not violate the prohibition against delegation of legislative power. *Buttfield v. Stranahan*, 192 U. S. 470, 494; *Union Bridge Co. v. United States*, 204 U. S. 364, 377; *St. Louis, Etc., Ry. Co. v. Taylor*, 210 U. S. 281; *McKinley v. United States*, *supra*.

We see no merit in the suggestion that the section is an abuse of the powers given Congress to provide for the national security and defense, or in the contention that the section violates the 10th amendment by interfering with the rights of the respective states as to regulation of industries within the states.

We have not discussed all the arguments adduced by counsel for plaintiffs in error in support of their contentions. We have, however, given them full consideration, and have reached the conclusion that no error was committed by the court below in the respects complained of, and that its judgment should be affirmed.

134

JUDGMENT.

[Filed May 4, 1922.]

Error to the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Opinion (Filed May 4, 1922).

135 United States Circuit Court of Appeals for the Sixth Circuit.

I, Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of The Matthew Addy Company vs. United States of America, No. 3517, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 29th day of May, A. D. 1922. Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit. [Seal of the United States Circuit Court of Appeals, Sixth Circuit.]

136 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Matthew Addy Company is plaintiff in error, and The United States of America is defendant in error, No. 3517, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of Ohio, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be cer-

137 tified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two. Wm. R. Stanbury, Clerk of the Supreme Court of the United States.

United States Circuit Court of Appeals for the Sixth Circuit, ss.

I, Arthur B. Mussman, clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of the record of the proceedings of this court in the within en-

titled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the sixth day of November, A. D. 1922, there was filed in my office a stipulation in the above entitled case in the following words, to wit:

United States Circuit Court of Appeals for the Sixth Circuit, ss.

THE MATTHEW ADDY COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

It is hereby stipulated by and between counsel for Plaintiff in Error and Defendant in Error that the transcript of the record of this Court in the above entitled cause, filed in the Supreme Court of the United States with a petition for writ of certiorari may be considered as a return by the Clerk of this Court to the writ of certiorari issued out of the Supreme Court of the United States on the 26th day of October 1922, directing this Court to certify to said Court the record and proceedings herein. The Matthew Addy Company, by Julius R. Samuels, Counsel. United States of America, by Jas. M. Beck, per Thos. H. Morrow, Counsel.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof. Witness my official seal, signature and the seal of said Circuit Court of Appeals at the city of Cincinnati, Ohio, in said circuit this sixth day of November, A. D. 1922. Arthur B. Mussman, Clerk United States Circuit Court of Appeals for the Sixth Circuit. [Seal of the United States Circuit Court of Appeals, Sixth Circuit.]

138 [Endorsed:] File No. 29,044. Supreme Court of the United States, October Term, 1922. No. 494. The Matthew Addy Company vs. The United States of America. Writ of Certiorari. Filed Nov. 6, 1922. Arthur B. Mussman, Clerk.

[Endorsed:] File No. 29,044. Supreme Court U. S., October Term, 1922. Term No. 494. The Matthew Addy Company, Petitioner, vs. The United States. Writ of certiorari and return. Filed Nov. 9, 1922.

84
485
No.

FILED
JAN 23 1923
W. E. STANLEY
CLERK

Supreme Court of the United States

October Term, 1922.

THE MATTHEW ADDY COMPANY,
Petitioner.

VS.

UNITED STATES OF AMERICA,
Respondent.

Motion and Petition for Writ of Certiorari
and Supporting Brief.

NELSON B. CRAMER,
JULIUS R. SAMUELS,
Cincinnati, Ohio.
Counsel for
The Matthew Addy Company,
Petitioner.



Supreme Court of the United States

October Term, 1922.

THE MATTHEW ADDY COMPANY,
Petitioner.

vs.

UNITED STATES OF AMERICA,
Respondent.

**Motion and Petition for Writ of Certiorari
and Supporting Brief.**

NELSON B. CRAMER,
JULIUS R. SAMUELS,
Cincinnati, Ohio.
Counsel for
The Matthew Addy Company,
Petitioner.

No. _____

Supreme Court of the United States

October Term 1922.

THE MATTHEW ADDY COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR WRIT OF CERTIORARI.

Comes now The Matthew Addy Company by Nelson B. Cramer and Julius R. Samuels, its counsel, and moves this Honorable Court that it shall by certiorari or by other proper process, directed to the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit, require said court to certify to this court for its review and determination that certain cause in said Circuit Court of Appeals lately pending, in which The Matthew Addy Company was plaintiff in error and the United States of America was defendant in error. and petitioner herein to that end, now tenders herewith its petition and brief with a certified copy of the entire record in said cause pending in said Circuit Court of Appeals for the Sixth Circuit.

NELSON B. CRAMER,
JULIUS R. SAMUELS,
Counsel for The Matthew Addy Company,
Petitioner.

No. ———.

Supreme Court of the United States
October Term 1922.

THE MATTHEW ADDY COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SIXTH DISTRICT.**

The petition of The Matthew Addy Company for a writ of certiorari directed to the Circuit Court of Appeals for the Sixth Circuit, requiring it to certify to the Supreme Court of the United States the case of *The Matthew Addy Company v. United States of America*, lately pending in said Circuit Court of Appeals for the Sixth Circuit.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Said petitioner respectfully shows to the court as follows:

I. That it is and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Ohio, with its principal place of business at Cincinnati, in said State of Ohio.

II. That the grand jurors for the United States of America, impanelled and sworn in the District Court of the United States for the Western Division of the Southern Judicial District of Ohio, at the October, 1919, term thereof, to-wit, on November 17, 1919, presented an indictment against petitioner, which indictment was in twenty-three counts, and which alleged under the Act of Congress of August 10, 1917 (40 Stat., 278), commonly known as "The National Defense (Lever) Act" and especially sections 1, 2, 3, 4 and 25 thereof, and the executive order of the President of the United States, dated August 23, 1917, that the President being authorized by the terms of said Act to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment and storage thereof among dealers and consumers, on August 23, 1917, issued an executive order in which it was provided among other things that:

"1. A coal jobber is defined as a person (or other agency) who purchases and re-sells coal to coal dealers or to consumers without physically handling it on, over or through his own vehicle, dock, trestle or yard.

"2. For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of 15c per ton of 2,000 lbs., nor shall the combined gross margins of any number of jobbers who buy and sell a given shipment or shipments of bituminous coal, exceed 15c per ton of 2,000 lbs."

The indictment then alleged that during the months of September, October and November, 1917, a state of war then existing between the United States and the Imperial German Government, and the law, orders and regulations above stated being then in force, defendant, The Matthew Addy Company, was engaged, in the business in the City of Cincinnati, Hamilton County, Ohio, as a coal jobber, as defined in said executive order.

That said The Matthew Addy Company, acting in its capacity as a coal jobber as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive of divers persons named in the various counts for certain quantities of bituminous coal, certain prices, which prices included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber as aforesaid of 25c per ton, and which said profit or margin of 25c per ton was, and was well known by said The Matthew Addy Company to be in excess of the profit or gross margin of 15c per ton of 2,000 lbs. permitted by the law, executive order, and regulations above referred to, to be added to the purchase price of said jobber; and that said The Matthew Addy Company did not have any contract with said parties named, made in good faith, prior to the 23d day of August, 1917, in which said contract the price for the purchase and sale of said coal was fixed, etc. (R., 4).

III. Motion to quash the indictment (R., 29) and demurrer to the indictment (R., 33) were overruled prior to the trial.

IV. A trial was had before the court and a jury on June 2, 1920, and a verdict of guilty was rendered in the manner and form as charged in counts Nos. 2, 5, 7, 9, 10, 11, 12, 13, 15, 16, 17, 18 and 20, and not guilty as

charged in the remaining counts thereof, 1 and 4 (R., 38); counts 3, 6, 8, 14, 19, 21, 22, and 23 were withdrawn from the jury. The case of The Matthew Addy Company and that of Benjamin N. Ford, Vice-President of said Company who was separately indicted, were tried together before the court and a jury and separate verdicts rendered by the jury in each case.

V. In the course of the trial, petitioner called as a witness on its own behalf, one Frank C. Deckebach, who qualified as a Certified Public Accountant (R., 75). Petitioner proffered in evidence a "statement of tonnage and expense of coal sales and cost in cents per ton" for the calendar years, 1917, 1918, and 1919 (defendant's Exhibit "C," R., 116-123), in order that the witness might explain the same; to which counsel for the government objected and which objections were sustained by the court and exceptions noted (R., 78, 79 and 80).

VI. Motions for a new trial and in arrest of judgment were overruled (R., 37 and 40) and sentence pronounced on June 24, 1920, fining petitioner the sum of One Thousand (\$1,000) Dollars and costs (R., 38).

VII. A writ of error was allowed from the United States Circuit Court of Appeals for the Sixth Circuit, and a transcript of the record filed in said court.

VIII. Said cause came on for hearing on error proceedings before the United States Circuit Court of Appeals for the Sixth Circuit, on March 7, 1922, and was submitted to the court, and on May 4, 1922, the said United States Circuit Court of Appeals for the Sixth Circuit, affirmed the judgment of the trial court (R., 128).

IX. Your petitioner believes that the said Circuit Court of Appeals for the Sixth Circuit erred in affirming

the judgment of the District Court, and should have reversed the said District Court and discharged the defendant.

X. And your petitioner further avers that the present case is one in which it is proper for this court to issue a writ of certiorari for the following reasons, among others, to-wit:

1. The questions of law involved in this case are questions involving the constitution and laws of the United States, and especially involving the validity of the Act of Congress of August 10, 1917 (40 Stat., 278), which was one of the most important of the war legislation passed by Congress during the late war.

2. The construction of the Act of Congress of August 10, 1917, affects the coal industry which is national and international in scope.

3. The Circuit Court of Appeals was in error in affirming the judgment of the District Court in construing the Act of Congress of August 10, 1917, and the rules and regulations of the President and the United States Fuel Administrator as it did.

4. The Circuit Court of Appeals was in error in affirming the judgment of the District Court in upholding the validity of the Act of Congress of August 10, 1917, and the rules and regulations of the President and the United States Fuel Administrator.

5. The Court of Appeals was in error in affirming the judgment of the District Court in holding that "public danger warrants the substitution of executive process for judicial process," and in so doing in substance held that the existence of a state of war suspends the operation upon the power of Congress of the guarantees and limitations of the fifth amendment to the constitution.

6. The decision of the Court of Appeals affirming the District Court is at variance with the principles laid down by this court in the case of *United States v. Cohen Grocery Company*, 255 U. S., 81-89.

Wherefore, your petitioner prays that this honorable court will grant a writ of certiorari directed to the Circuit Court of Appeals for the Sixth Circuit, requiring that the record of said case in said court, and its judgment be certified to this court, and that this court will thereupon proceed to correct the errors complained of, reverse said judgment, and enter final judgment and discharge petitioner, and for such further proceedings as to this honorable court may seem just and proper in the premises.

THE MATTHEW ADDY COMPANY,

By NELSON B. CRAMER,
JULIUS R. SAMUELS,

Its Counsel.

United States of America, State of Ohio, County of Hamilton, ss.:

Nelson B. Cramer, being first duly sworn, deposes and says that he is counsel for The Matthew Addy Company, the petitioner herein; that he has read the foregoing petition, and is familiar with its contents and that the allegations contained therein are true as he verily believes; and further that in his opinion said petition is well founded and that the case is one in which the prayer of the petitioner should be granted by this court.

NELSON B. CRAMER,

Sworn to before me and subscribed in my presence, this 3rd day of July, 1922.

ARTHUR W. GORDON,

(Seal)

Notary Public, Hamilton County, Ohio.
My commission expires November 26, 1923.



Supreme Court of the United States

October Term, 1922.

THE MATTHEW ADDY COMPANY,
Petitioner.

against

UNITED STATES OF AMERICA,
Respondent.

Brief in Support of Petition for Writ of Certiorari

NELSON B. CRAMER,
JULIUS R. SAMUELS,
Cincinnati, Ohio.
Counsel for
The Matthew Addy Company,
Petitioner.

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No. ———.

Supreme Court of the United States

October Term 1922.

THE MATTHEW ADDY COMPANY,
Petitioner.

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF CASE.

Petitioner prays for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit, requiring that said cause in said court, and its judgment be certified to this court, to secure reversal of the judgment of said court affirming the judgment of the District Court of the United States for the Southern District of Ohio, Western Division, wherein a verdict of guilty was returned by a jury in said court against petitioner on an indictment based on the Act of Congress of August 10,

1917 (40 Stat. 278) commonly known as "The National Defense (Lever) Act" and the executive order of the President of the United States, dated August 23, 1917 (compilation of Rules, Regulations and Promulgations of the United States Fuel Administrator, Harry A. Garfield.)

The facts of the case are succinctly but comprehensively stated in the petition for a writ of certiorari set out in the forepart of this pamphlet.

Petitioner invokes the exercise by this court of its power to issue a writ of certiorari herein for the following reasons, among others, to-wit:

(a) The questions of law involved in this case are questions involving the constitution and laws of the United States, and especially involving the validity of the Act of Congress of August 10, 1917 (40 Stat. 278) and the rules, regulations and promulgations of the President of the United States and the United States Fuel Administrator acting under the direction of the President, which were among the most important of all the war legislation passed by Congress during the late war.

(b) The proper construction of the Act of Congress of August 10, 1917 and the rules and regulations of the President of the United States and the Fuel Administrator will serve as a landmark in the development of the constitutional law of this country, and as a guide to Congress and executive and administrative officers of the United States, as to the powers that may be exercised by them during an emergency consistent with the constitutional limitations upon their powers.

(c) The decision of the Court of Appeals affirming the District Court is at variance with the principles of con-

stitutional law laid down by this court in *Ex Parte Miligan*, 4 Wall. 2, 121-127; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 156 and the very recent case of *United States v. Cohen Grocery Co.* 255 U. S. 81, 88-89.

(d) The proper construction of the Act of Congress of August 10, 1917 and the rules and regulations of the President of the United States and the Fuel Administrator directly affect the coal industry of the United States, which is both national and international in scope, as well as the industries involving the production, distribution and consumption of foods and fuel throughout the United States.

SPECIFICATIONS OF ERROR.

The assignment of errors alleged to have been committed by the District Court appear at R. 93.

The first error and fundamental question is raised by the seventh assignment which is as follows:

"In charging the jury that defendant might be found guilty for violation of the order of the President of August 23, 1917, although the undisputed evidence showed that in respect to each transaction covered by the indictment, the coal had been purchased by The Matthew Addy Company prior to that day, and prior to August 10, 1917."

Second, the court erred in not permitting defendant to prove that the gross margin of 15 cents per ton added to its purchase price, "was confiscatory and compelled defendant to dispose of its product without allowance for expense and a just compensation for its services" (See R. 79 and Assignments of Error, 3 and 6, R. 94).

Third, the court erred in overruling the motion of defendant to quash the indictment and each and every count thereof, for the reasons urged.

Fourth, the court erred in overruling the claims of defendant that the statute and the executive order, upon which the indictment was based, was, as construed by the court and applied to the undisputed facts, in violation of the several constitutional provisions specially relied on.

Fifth, the court erred in not directing a verdict for defendant, on the ground that the proof failed to sustain the indictment.

BRIEF OF THE ARGUMENT.

I.

The court misconstrued the executive order upon which the indictment was based as applied to the undisputed facts.

II.

The court erred in not permitting defendant to show what were its costs and profits.

III.

The court erred in overruling the motion of defendant to quash the indictment and each and every count thereof, for the reasons that—

(a) The indictment and each of its several counts is insufficient in law and fact.

(b) The allegations of the indictment are indefinite as to material matters and were not sustained by the evidence.

IV.

The court erred in overruling the demurrer of defendant to the indictment, which attacked the constitutionality of the Act of Congress of August 10, 1917, commonly known as the "National Defense" (Lever) Act (40 Stat. 278), and the executive order of the President, dated August 23, 1917, for the reasons, that—

(a) They violate the fifth amendment to the Constitution of the United States in that, defendant is deprived of its property without due process of law.

(b) The Act of Congress violates Section 1, of Article 1; Section 1 of Article 2, and Section 1 of Article 3 of the Constitution of the United States, in that it delegates legislative and judicial powers to the President of the United States, to the United States Fuel Administrator appointed by the President, and the Federal Trade Commission.

ARGUMENT.

I.

The court misconstrued the executive order upon which the indictment was based, as applied to the undisputed facts.

By Section 25 of the National Defense (Lever) Law, approved August 10, 1921, it was provided:

"That the President of the United States shall be, and he is hereby, authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, whenever and wherever sold, either by producer or dealer, to establish rules for the regulation of, and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers,

domestic or foreign; said authority and power may be exercised by him in each case through the agency of the Federal Trade Commission during the war or for such part of said time as in his judgment may be necessary."

By an order issued August 21, 1917, effective that day, the President fixed a scale of prices for bituminous coal at the mines in most of the coal producing districts. The price fixed for the kind of coal involved in this case, to-wit: West Virginia run-of-mine, was \$2.00 per ton of 2,000 lbs. f. o. b. mines.

On August 23, 1917, the President issued an order fixing the price on anthracite coal throughout the anthracite producing regions, to become effective September 1, 1917. The same order contained the "Jobber's Margin," and provided:

"1. A coal jobber is defined as a person (or other agency) who purchases and resells coal to coal dealers or to consumers without physically handling it on, over, or through his own vehicle, dock, trestle or yard.

2. For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of 15c per ton of 2,000 pounds, nor shall the combined gross margins of any number of jobbers who buy and sell a given shipment or shipments of bituminous coal exceed 15c per ton of 2,000 pounds.

3. For buying and selling anthracite coal a jobber shall not add to his purchase price a gross margin in excess of 20c per ton of 2,240 pounds when delivery of such coal is to be effected at or east of Buffalo. For buying and selling anthracite coal for delivery west of Buffalo a jobber shall not add to his purchase price a gross margin in excess of

30c per ton of 2,240 pounds. The combined gross margins of any number of jobbers who buy and sell a given shipment or shipments of anthracite coal for delivery at or east of Buffalo shall not exceed 20c per ton of 2,240 pounds, nor shall such combined margins exceed 30c per ton of 2,240 pounds for the delivery of anthracite coal west of Buffalo. Provided that a jobber's gross margin realized on a given shipment or shipments of anthracite coal may be increased by not more than 5c per ton of 2,240 pounds when the jobber incurs the expense of re-screening it at Atlantic or lake ports for transshipment by water."

The evidence shows without dispute that defendant bought the coal July 31, 1917, for \$3.25 per ton f. o. b. mines, or \$1.25 per ton more than the price f. o. b. mines fixed by the President's order of August 21, 1917; and that it sold it in August and September for \$3.50 per ton.

The plain meaning of the executive order of August 23, 1917, is, that after the going into effect of that order, a jobber is prohibited from adding to his purchase price a gross margin in excess of 15c per ton "for the buying and selling of bituminous coal" and the order has no application to a transaction whereby a jobber, having bought coal prior to August 23, 1917, sells it thereafter. In other words, the order must be construed as prospective only, and prospective in respect to all of its elements; that is to say, to both the buying and selling of a given lot of coal.

It appears from the several orders of the President, which were judicially noticed by the court (R. 81) that on August 23, 1917, the President, under authority of the law, had adopted a comprehensive scheme, fixing

the prices at the mines throughout the country, for both bituminous and anthracite coals, and in connection therewith, provided the jobbers' margins for "the buying and selling" of both classes of coal.

The court below either treated the words "buying and," in the phrase "for the buying and selling of," as if they were not included in the order; or else the court has given to the order a retroactive operation, by holding that the "buying" of a particular shipment by a jobber, which is an essential part of the offense and necessary to constitute it, may be punishable, although it occurred prior to the enactment of the law.

By the order of August 23, in the first section thereof, the President carefully defined coal jobbers, in a clause inserted only for the purpose of so defining those words and complete in itself. Having thus defined, or described **the persons** (*descriptio personae*) who are capable of committing the specific offense, the President proceeded to define **the acts** which constitute the offense. Both in respect to the dealings in bituminous coal by a single jobber, or several jobbers; and in respect to dealings in anthracite at or east of Buffalo and anthracite west of Buffalo, in each case, by a single jobber, or several jobbers, he separately and distinctly provided that it was "**for the buying and selling**" that the jobber should add to his purchase price not more than a particular "gross margin."

In doing so the President must be supposed to have had in mind the nature of a jobber's business, and his necessary relationship to a given transaction. A jobber does not produce coal and sell it, but buys it and sells it. The transactions, whereby he purchases, nec-

essarily involve an expense to him just as much as do the transactions whereby he sells with the additional intermediate expense which results from carrying unsold coal, equal in any event to the loss of interest on the money invested. In respect to his business of purchasing and carrying he is entitled to his cost and compensation for his services.

Having these facts in mind, the President wisely and fairly treated the relationship between a jobber and a particular transaction, or to use the words of the order, his relation to "a given shipment or shipments" as a unit. No permissible legal construction of the order can be adopted, which attributes to the President an intention to limit a jobber to a gross margin in the selling of a particular shipment, which might well be less than the expense already incurred by him in the purchase thereof, prior to the promulgation of the order.

In the present case and in many possible cases there might be shipments of coal in the hands of jobbers on August 23, 1917, theretofore purchased by them, in respect to which their expense connected with the purchase and carrying already exceeded the gross margin of 15c permitted by the order of that day. If the order of that day had the effect of compelling such jobbers to dispose of such shipments at a loss, or in the alternative, subject themselves to the penalties against "hoarding" provided in Section 26 of the law, the law itself would be open to grave constitutional objections. Whereas, no such objections could be raised, if the order is prospective only, and to be applied only to such jobbers as might see fit after the promulgation of the order, to engage in the business "of buying and selling."

We have already referred to the fact that by the two orders of August 21st and August 23rd, the President adopted a comprehensive schedule of prices for coal, both bituminous and anthracite, at the mines, throughout the country. We submit that the adoption of such a schedule of prices, taken in connection with the clear wording of clauses 2 and 3 of the order of August 23rd, shows that it was for the **buying and selling thereafter of coal**, the price of which at the mines was that day fixed, that the jobbers' margins were fixed.

This construction indicates a comprehensive, intelligible purpose, and gives effect to all the words of the order according to their plain English significance.

All of the sales by defendant, covered by the indictment were in the months of August and September, but the offense of which defendant was convicted was not the offense charged in the indictment or defined by any order in force in August and September, but was, if anything, an offense in violation of a subsequent order of October 6, 1917, of which Paragraph 9 provided:

“A jobber who, at the time of the President's order fixing the price of the coal in question at the mine (the order of August 21), had contracted to buy coal at or below the President's price, and at that time had no contract to sell such coal, shall not sell the same at a price higher than the purchase price plus the proper jobber's commission as determined by the President's regulation of August 23, 1917.”

The issuance of the order of October 6 shows conclusively that prior to that day it was not considered an

offense for a jobber who had purchased coal prior to August 23 to sell the same at any price obtainable on the market.

The principle is well established that laws, especially laws creating crimes, are not to be given a retroactive effect unless the legislative intention that they shall have such effect is clear. This is especially true when the retroactive construction throws doubt upon the constitutionality of the law.

The very recent case of *Schrab v. Doyle*, Collector of Internal Revenue, 42 Supreme Court Reporter 391, decided May 1, 1922, involved the question of the retroactive construction of a law of the United States, and this court held:

"1. Laws are not to be construed as applied to cases which arose before their passage, unless that intent be clearly declared, since there is absolute prohibition against such law when their purpose is punitive, and the situation which impels; prohibition in such cases exacts clearness of declaration in other cases."

At page 392 of the opinion this court said:

"The act of September 8, 1916, is within the condemnation.

There is certainly in it no declaration of retroactivity, "clear, strong, and imperative," which is the condition expressed in *United States v. Helth*, 3 Cranch, 399, 413 etc.

If the absence of such determining declaration leaves to the statute a double sense, it is the command of the cases that that which rejects retroactive operation must be selected."

The learned District Judge was of opinion (see Ruling on Motion for a New Trial, R. 36) that because it was stated as a recital of fact in one of the orders of the Fuel Administration (Order of November 8, 1917) that the "coal mine output was largely contracted to be sold in advance," that the order of August 23, if not construed so as to penalize the sale by jobbers thereafter, of coal previously purchased by them, would leave it "open to the jobber to demand what he could get for his coal, and to thus carry on the injurious speculation, manipulation and private control of the supply which the Act was designed to prevent."

We submit that this is not a permissible method of legal reasoning for the construction of a law creating a criminal offense. There is nothing to indicate that when the order of August 23 was issued, the President had any information concerning the amount of coal at the mines already contracted for, or whether the condition in fact existed on August 23. In any event, and even assuming that the condition did exist, by reason of the fact that only eleven days had elapsed since the passage of the Lever Law, and there had been no intervening investigation, it seems clear that he was not in possession of any such information.

II.

The Court Erred in Not Permitting Defendant to Show What its Costs and Profits Were.

If we are right in our first contention, the judgment should have been reversed and it would be unnecessary for the court to consider the other assignments of error. If we are not correct in that argument, the question

remains whether the defendant was not entitled to show that 15c per ton added as its commission to its purchase price resulted in loss or inadequate compensation.

The order of August 23, 1917, provides in terms that "For the buying and selling of bituminous coal, a jobber shall not add to his purchase price a gross margin in excess of 15c per ton." But the question is whether the President had power under the law to limit the "gross margin" or commission of the jobber to a commission which resulted in no compensation adequate to the jobber's services, or as in this case to a loss because the selling price averaged less than the cost. The question was raised at the trial by the request for Special Charge No. 2. (R. 82):

"If you find from the evidence that the gross margin of 15c per ton for jobbers as fixed by the President on August 23rd, 1917, does not include defendant's costs of doing business and a just and reasonable sum for profit, then I charge you as a matter of law that you must return a verdict of 'not guilty.' "

This charge was refused and exception reserved and is preserved by the third assignment of error (R. 94):

"In sustaining the objection of counsel for the government to the defendant's offer to prove that the profit of The Matthew Addy Company, upon each and every transaction upon which the indictment and the several counts thereof were based was not in excess of 15c per ton of 2,000 lbs."

and in the sixth assignment (R. 95):

"In charging the jury that the word 'profit' in the

indictment, at each of the places where said word appears, was the equivalent of the words 'gross margin,' and in charging the jury that they might return a verdict against defendant in the absence of proof that The Matthew Addy Company made a profit per ton on the coal covered by the indictment, in excess of 15c."

The Government offered no evidence to show that any part of the commission or margin of 25c, added by defendant to its purchase price, was profit.

The defendant offered to show and had incorporated into the record in connection with the evidence of Frank C. Deckebach (R., 75), a certified public accountant, comprehensive tabulations from its books showing the cost and expense of its business in cents per ton, not only for the months covered by the indictment, but prior and subsequent thereto. In the nature of things it was impossible to distribute and allocate to the particular shipments involved in the indictment, the proper proportion of the company's total expenses rightly allowable as selling cost. But by a distribution of all costs against all sales, it was shown that for the month of July, 1917, the cost of selling a ton of coal was \$.3425, or more than 9c over the total commission of 25c which the company added to its selling price of the coal purchased by it from Bluefield Coal and Coke Company for \$.25 per ton on July 31, 1917 (Government Exhibits 1 and 2, R., 102). For the month of August, 1917, the company's selling cost per ton was \$.1457, or a fraction of a cent less than the 15c per ton commission allowed by the executive order. For the month of September the company's selling

cost per ton was \$.1790, or nearly 3c in excess of the commission allowed. The evidence was rejected, the special charge refused, and the jury instructed that the results of the purchases and sales by defendant by way of profit or loss were immaterial.

We have already quoted, at page —, the section of the Act which authorizes the President to fix the price of coal and coke, and provides that such "authority and power may be exercised by him in each case through the agency of the Federal Trade Commission," etc. In overruling a motion to quash the indictment the District Judge held that the word "may" in this clause is permissive, and that the President is not required to exercise his authority to regulate the prices through the Federal Trade Commission; and the judgment below was a conviction upon the order of the President of August 23, not concurred in or promulgated by the Federal Trade Commission.

In order to properly construe the law it should be noted that where the Federal Trade Commission undertakes to fix prices, it must, under Paragraph 11 of Section 25, "make full inquiry, giving such notice as it may deem practicable, into the cost of producing," etc., and that having completed such inquiry it shall (Par., 14):

"In fixing maximum prices for producers * * * allow the cost of production, including the expense of operation, maintenance, depreciation, and depletion, and shall add thereto a just and reasonable profit."

and in Paragraph 15 it is further provided that:

“In fixing such prices for dealers, the Commission shall allow the cost to the dealer and shall add thereto a just and reasonable sum for his profit in the transaction.”

The purpose and intent of the law as a whole was not to confiscate, during a public emergency, either the product of the producer or the good will or services of the dealer or jobber, but to regulate prices after inquiry, and under the ordinary constitutional limitations. And even if it be true that the immediate emergency justified the President in fixing jobbers' prices, instead of adopting the slower method of submitting them to the Federal Trade Commission to be fixed upon investigation, we submit that the President, in exercising such power in emergency, was not free from the limitations imposed upon the Federal Trade Commission in the event that it should exercise the same powers by direction of the President.

We submit that where the President, without investigation, fixed a dealer's or jobber's price, without allowing “the cost to the dealer and adding thereto a just and reasonable sum for his profit,” the dealer or jobber may show upon an indictment based upon Paragraph 17, for violation of an order of the President, that the price fixed by the order did in fact not allow “a just and reasonable sum for his profit in the transaction,” but actually resulted in a loss.

III.

The court erred in overruling the motion of defendant to quash the indictment and each and every count thereof.

(a) The indictment and each of its several counts, is insufficient in law and fact.

The District Judge, in his opinion of February 26, 1920, overruling defendant's motion to quash the indictment (R., 28), disposed of our first contention on this point in the following language:

"The indictment is sufficient. The word 'may' in the last clause of the first paragraph of Section 25 of the National Defense (Lever) Act (40 Stat., 276) is permissive. The President is thereby empowered, not required, to exercise his authority to regulate the prices and production of coal through the Federal Trade Commission in each instance. This is the ordinary significance of the word. *U. S. v. Lexington Mill Co.*, 232 U. S., 399, and that it was so intended is clear from the context. It may be noted that the third paragraph vests in the President a similar optional discretion to act through the Commission or otherwise."

We submit that this construction of the law is not correct.

Paragraph one, which authorized and empowers the President to fix the price of coal and coke, and to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment or storage, is a startling innovation in legislative

action, due to the exigencies of war. If Paragraphs 1 and 17 had stood alone, without the inclusion of the intermediate paragraphs, the construction adopted by the District Court might have been necessary, but reading the section as a whole we submit that there was no intention on the part of Congress to authorize the President to fix, without investigation or appeal, either prices or jobbers' commissions on the sale of coal and coke. This is apparent from the provisions of the sections other than 1 and 17.

Paragraphs 2, 3 and 4 relate to the requisition of "the plant, business and all appurtenances * * * belonging to such producer as a going concern," and their operation during the period of the war.

Paragraph 3 provides that in case of such requisition "a just compensation for the use thereof" shall be paid, which compensation the President shall fix or cause to be fixed by the Federal Trade Commission, and Paragraph 4 provides that in case of requisition, if the compensation fixed be not satisfactory to the owner, he shall, upon payment to him of 75 per cent. of the amount fixed, "be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation."

Paragraphs 6, 7 and 8 provide an alternative to requisition of the plants of producers and dealers. That is, "an agency to be designated by the President," to which producers shall sell their products, the prices to be fixed and regulated by such agency.

By Paragraph 8 it is provided that:

"The prices to be paid for such products so purchased shall be based upon a fair and just profit over

and above the cost of production, including proper maintenance and depletion charges, the reasonableness of such profits and costs of production to be determined by the Federal Trade Commission,"

with further provision that in case the owners are dissatisfied with the prices so fixed, they shall be paid seventy-five percentum of the amount, with the right to bring suit to recover the actual value of their product, to be determined by the courts.

Paragraphs 11, 12, 13, 14 and 15 prescribe the procedure whereby the Federal Trade Commission, when directed by the President, is to make inquiry into the cost of producing coal and coke, and Paragraph 13 provides that "If the President has decided to fix the prices at which any such commodity shall be sold by producers and dealers generally" the Federal Trade Commission shall "fix and publish maximum prices for both producers of and dealers in any such commodity," etc.

Paragraph 17 provides a punishment for any one who, with knowledge that the prices of any such commodity have been fixed as herein provided, violates them.

The Federal Trade Commission is required by Sections 14 and 15, in fixing maximum prices, both for producers and dealers, to allow the cost of production, or service, and "add thereto a just and reasonable sum for the profit in the transaction." We submit that Paragraph 1, properly construed, and considered as a part of the entire statute, cannot be casually disposed of by merely defining "may" therein as permissive; that the proper construction of Paragraph 1, conferring unusual powers upon the executive, also defined the only manner in which such powers could be exercised, and that the

word "may" is equivalent, as it frequently is, to the word "shall," and refers to the special requirements of Paragraphs 11, 12 and 13, inclusive, in providing the method whereby the President is authorized to fix prices for "producer or dealer."

Paragraph 16 strongly enforces our contention as to the proper construction of the statute. It reads:

"The maximum prices so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith, prior to the establishment and publication of the maximum prices by the commission."

During the course of the trial it was recognized that this paragraph was applicable to the maximum commission fixed by the President, for violation of which defendant was indicted. But the paragraph did not undertake to preserve the inviolability of the contracts as against prices fixed by the President, but only as against prices fixed by the commission. If the Government's construction of Paragraph 1 is correct, there would appear to be no sound rule of construction which would permit Paragraph 16 to make an exception to the unlimited power conferred on the President by Paragraph 1.

If our construction of the statute is correct it follows that—

The indictment should allege the passage of the Act and the principal provisions thereof and then that the President having decided to fix prices at which coal and coke might be sold, that the Federal Trade Commission fixed and published maximum prices for dealers in such commodities and that after such prices were fixed and

published, defendant, with knowledge thereof violated same by asking, demanding and receiving higher prices than those fixed.

Nowhere in the indictment does it appear that the Federal Trade Commission fixed and published maximum prices and that defendant had notice thereof. If the Federal Trade Commission did not in fact fix and publish maximum prices and defendant did not in fact know or could not have known of any fixing of prices by it, then the defendant has violated no law and should not have been compelled to plead to any such indictment.

It is a well recognized rule in criminal pleading, that no material allegation may be omitted, for without it, a criminal offense is not described.

In the case of *United States v. Hess*, 124 U. S., 483, at page 486, it was held:

“The general, and, with few exceptions, of which the present is not one, the universal rule on this subject, is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly and not inferentially, or by way of recital.”

See also *Ledbetter v. United States*, 170 U. S., 606.

The rule just quoted applied equally to common law offenses as to statutory offenses. In an indictment for a purely statutory offense, the reason for the rule is all the more evident, for a common law crime may become

defined through legislative and judicial interpretation, besides the influence of public opinion expressed regarding the law, during many years of its effectiveness.

IV.

The court erred in overruling the demurrer of defendant to the indictment, which attacked the constitutionality of the Act of Congress of August 10, 1917, commonly known as the "National Defense (Lever) Act" (40 Stat. 278), and the executive order of the President, dated August 23, 1917.

(a) The Act of Congress and the rules, regulations, promulgations and publications of the President and the United States Fuel Administrator violate the fifth amendment to the Constitution of the United States, in that defendant is deprived of its property without due process of law.

The first clause of Section 25 of the Act, gives the President authority to fix the price of coal and coke. The eleventh clause provides that when directed by the President, the Federal Trade Commission is required to inquire as to the costs of production of coal and coke. The thirteenth clause provides that if the President has decided to fix prices and the Federal Trade Commission has completed its inquiry, **the Federal Trade Commission shall fix and publish maximum prices, which prices shall be observed by all producers and dealers** (black type ours).

Then in the fourteenth and fifteenth clauses, it is provided how maximum prices shall be arrived at. The seventeenth clause prescribed the penalty for not complying with the prices as fixed.

There is nothing in the Act of Congress nor in the regulations of the President thereunder, as they were construed and applied by the District Court, which provide for a hearing with regard to the fixing of prices. There is not even any semblance of a hearing either before the President or the Federal Trade Commission or a court. The President by himself or through the Federal Trade Commission may arrive at a price to be fixed, no matter how arbitrary or unreasonable, and every one within the meaning of the Act must comply therewith. This is a taking of one's property or services without compensation and is purely confiscatory and within the prohibition of the amendment to the Federal Constitution. Assuming that the President has power to act without action by the Federal Trade Commission, there is nothing in the Act of Congress which provides for the machinery to arrive at the costs of production. It is true the President may, if he sees fit, exercise his power through the agency of the Federal Trade Commission and the Federal Trade Commission may make inquiry as to the costs of production, but how they shall arrive at such costs of production, is not stated except that the Act in Clauses fourteen, fifteen and sixteen of Section 25 provides, "that in fixing maximum prices for producers, the commission shall allow the costs of production, including the expense of operation, maintenance, depreciation and depletion and shall add thereto a just and reasonable profit."

That in fixing such prices for dealers, the commission shall allow the costs to the dealer and shall add thereto a just and reasonable sum for his profit in the transaction.

That the maximum prices so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith prior to the establishment and publication of maximum prices by the commission.

In the motion to quash the indictment (R. 29), which was overruled by the court, we contended that the word

"may" as used in the first paragraph of Section 25, of the Act of Congress in question should be read as "shall." That it was obligatory upon the President in all cases to exercise his authority therein vested in him, through the agency of the Federal Trade Commission.

The court below construed the phrase mentioned as being permissive on the part of the President, to exercise his authority through the agency of the Federal Trade Commission.

If the court's ruling on the motion to quash the indictment is correct, and as the Act of Congress in question nowhere provides for an investigation by the President nor for any semblance of a hearing before him, the Act of Congress in question is clearly invalid, as depriving defendant of its property without due process of law, and besides, the fact remains that the President has not exercised his authority through the Federal Trade Commission, which might have the machinery to provide for a hearing.

While the President is given the power to exercise his authority through the Federal Trade Commission, it is very apparent from his rulings and regulations, beginning with the first one under date of August 21, 1917, that he has not seen fit to use the agency of the Federal Trade Commission and that he has arbitrarily arrived at the maximum prices which he fixed in exercising that authority himself.

Nowhere in the Act of Congress nor in any of the rulings and orders of the President, or the United States Fuel Administrator, is there a remedy provided for defendant, in the event that the prices as fixed were found not to include the cost of doing business, together with a fair profit, which the Federal Trade Commission is enjoined to allow dealers, when it (The Federal Trade Com-

mission) investigates the cost of doing business and publishes maximum prices after the President has decided to fix prices of coal and coke.

Unlike the provision made in the Act of Congress, for producers, who, in the event that their properties and output are commandeered by the President, may sue the United States, the defendant as a jobber, is entirely without remedy and if it exercises the privilege of charging a price which covers the cost of doing business, plus a fair profit, as the law intended for it to have, it is amenable to criminal proceedings, which impose a very heavy penalty.

If the Law authorizes the President, by mere executive order without previous investigation to finally fix the jobber's compensation for his services without provision for appeal, and does not permit the defendant to show upon the trial that the compensation so fixed is unfair and inadequate, the law is unconstitutional. Due process of law, as granted by the constitution, is not dependent upon the form of procedure, but there must be provided some fair method, either in advance or afterwards, for compensating the person whose property is taken, or whose service is compelled, for public uses.

It may be that where, upon investigation and hearing, a jobber's commission had been fixed for the trade in general, a particular jobber could not complain because of the fact that by reason of circumstances peculiar to him, the commission so fixed did not afford him adequate compensation. (See remarks of the District Judge, R., 78.) But in this case there was no hearing or investigation prior to the order fixing the jobber's commission nor any pretense of any. The arbitrary jobber's commission

embodied in the order of August 23, became effective thirteen days after the passage of the law itself. On September 6 the United States Fuel Administrator, referring to the prices and commissions theretofore fixed, frankly stated that they had been fixed without investigation. He said: "The prices fixed are provisional. They will stand unless changed by order of the President for good cause shown. The Fuel Administration will examine all applications for revision of prices, accompanied by cost statements presented in writing." In fact they were afterwards changed several times and in many particulars.

The fixing of rates, charges or compensation for property taken, is certainly not an executive function. Where compensation for property taken is fixed by judgment of a court, it is always after hearing and investigation; where rates and charges are fixed by the Legislature it is at least always presumed that investigation has been made.

If the President or other executive officer may exercise such power without investigation as was done in the present case, at least it must be open to the citizen to show upon the trial that the enforcement of the order was confiscatory or non-compensatory as to him. This right was denied the defendant in this case.

The District Judge in his opinion on demurrer to the indictment admitted that under ordinary conditions, a law such as the Act of Congress of August 10, 1917, would be invalid because of want of due process of law and said:

"It is true that the Act afforded no opportunity for judicial review of the reasonableness of the prices fixed by the President, and this has been determined.

under ordinary circumstances, with reference to railroad and other rates, to be want of due process of law. *Chicago, Milwaukee & St. Paul Ry. v. Minnesota*, 134 U. S., 418, 10 Sup. Ct., 462, 702; *Minnesota Rate Cases*, 230 U. S., 352-434; *Oklahoma Operating Co. v. Love*, 252 U. S., 331; *Holter Hardware Co. v. Boyle*, 263 Fed., 134."

But the learned District Court further said:

"Public danger warrants substitution of executive process for judicial process. *Moyer v. Peabody*, 212 U. S., 78" (R., 32).

In its opinion affirming the District Court, the Court of Appeals quoted that part of the opinion of the District Court and concurred in its views. In this respect, we submit that both the District Court and the Court of Appeals were in error, and that such a holding is in direct variance with the salutary rule laid down by this court in the early case of *Ex parte Milligan*, 4 Wall., 2, 121-127; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S., 146-156, and the very recent case of *United States v. Cohen Grocery Co.*, 255 U. S., 81, 88-89.

In the Cohen case *supra*, this court speaking through Mr. Chief Justice White, at page 88 of the opinion said:

"We are of the opinion that the court below was clearly right in ruling that the decisions of this court undisputably establish that the mere existence of a state of war would not suspend or change the operation upon the power of Congress of the guarantees and limitations of the fifth and sixth amendments as to questions such as we are here passing upon (citing cases). It follows that, in testing the oper-

ation of the Constitution upon the subject here involved, *the question of the existence or non-existence of a state of war becomes negligible, and we put it out of view.*" (Italics ours.)

While this court in the Cohen case held Section 4 of the Act of Congress of August 10, 1917, unconstitutional because of indefiniteness, and notwithstanding that the facts in that case were different than the facts in this case, in that in the Cohen case no prices were fixed, and therefore the question of what were reasonable prices was too indefinite and did not sufficiently inform the defendant of the charge against him, while in the case at bar, definite prices were fixed, nevertheless, the principle laid down by this court in the Cohen case, viz., that the existence or non-existence of a state of war or using the words of the District Judge, the existence or non-existence of "public danger," becomes negligible, and should be put out of view, and the usual rules with reference to the limitations of the Constitution upon the power of Congress and the chief executive should be applied. If as the District Court and the Court of Appeals admits, that under ordinary circumstances there is a want of due process of law, so far as this petitioner is concerned, then by applying the rule laid down by this court in the Cohen case, petitioner has been deprived of due process of law, notwithstanding this proceeding grew out of, and was during the existence of a state of war and based upon the Act of Congress passed during such state of war.

Our principal objection to the statute on constitutional grounds, as applied to the facts in this case, is not so much that the President was without power to fix the

broker's commissions, but that Congress was without power to authorize him to do so without investigation, and subject the defendant to criminal punishment without permitting it to show that the commission fixed was non-compensatory. In other words, we insist that property can not be taken for a public use, or services compelled for such use, without the right to have it determined somewhere and at some time, either in advance or afterward, whether the compensation provided is adequate.

(b) The Act of Congress violates Section 1 of Article 1; Section 1 of Article 2 and Section 1 of Article 3, of the Constitution of the United States, in that it delegates legislative and judicial powers to the President of the United States, to the United States Fuel Administrator appointed by the President, and the Federal Trade Commission.

The courts have uniformly held that rate fixing or price fixing is a legislative function. It has also been recognized that if the subject is one over which the state legislature or Congress has authority, it may regulate the use or even the price of the use of private property.

Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 167 U. S., 479, 505; *City of Knoxville v. Knoxville Water Co.*, 212 U. S., 1; *Minnesota Rate Cases*, 230 U. S., 352; *Field v. Clark*, *Boyd v. United States*, and *Sternback v. United States*, 143 U. S., 649.

CONCLUSION.

We respectfully submit that upon the showing made to this court, a writ of certiorari should be granted, directed to the Circuit Court of Appeals for the Sixth Circuit, requiring that the record of said cause in said court and the judgment be certified to this court, and that thereupon this court proceed to correct the errors complained of, reverse said judgment, enter final judgment and discharge petitioner, and grant such further relief as this court may deem just and proper in the premises.

NELSON B. CRAMER, and
JULIUS R. SAMUELS,
Attorneys for Petitioner.

Office Supreme Court, U.

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Supreme Court of the United States

OCTOBER TERM, 1923.

No. ~~100~~ 84

THE MATTHEW ADDY COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

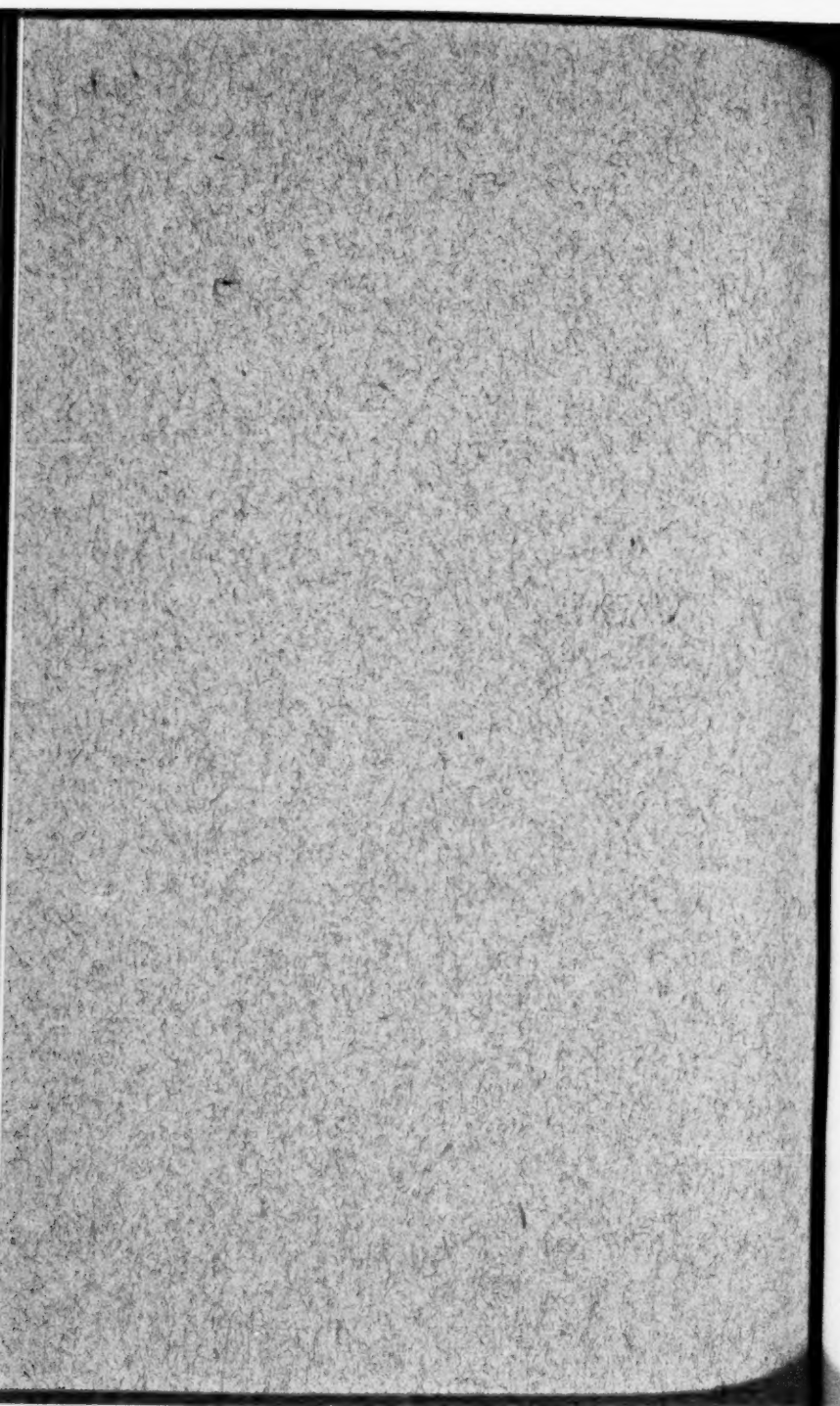
Respondent.

On Writ of Certiorari to the United States Circuit Court
of Appeals for the Sixth Circuit.

BRIEF OF PETITIONER.

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Supreme Court of the United States

No. 494.

THE MATTHEW ADDY COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Circuit Court
of Appeals for the Sixth Circuit.

BRIEF OF PETITIONER.

PRELIMINARY STATEMENT.

This cause comes before the court on a writ of certiorari issued out of this court to the United States Circuit Court of Appeals for the Sixth Circuit, to certify the record in this cause to this court.

This proceeding is to review a judgment of the District Court of the United States for the Southern District of Ohio, Western Division (Peck, J.), entered June 24, 1920 (R., 26), whereby, upon a verdict of guilty (R., 23), and overruling a motion for a new trial (R., 26) and a motion in arrest of judgment (R., 27), the court sentenced the petitioner, defendant below, to pay a fine of one thousand (\$1000.00) dollars and costs. (R., 26.)

The case was then taken to the United States Circuit Court of Appeals for the Sixth Circuit on a writ of error, and the judgment of the District Court was affirmed on May 4, 1922, (R., 89) reported in 281 Fed., 298. Thereafter a writ of certiorari was issued out of this court, on motion of petitioner.

STATEMENT OF THE CASE.

The indictment, upon which petitioner was found guilty, was in twenty-three counts, and alleged that, under the act of Congress of August 10, 1917, (40 Stat., 278; Comp. St. 1919, Sec. 3115½q), commonly known as the "National Defense (Lever) Act," and especially Sections 1, 2, 3, 4 and 25 thereof, the President, being authorized by the terms of said act to make regulations and issue orders fixing the price of coal, and to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment or storage thereof among dealers or consumers, on August 23, 1917, issued an executive order, in which it was provided, among other things, that:

"1. A coal jobber is defined as a person (or other agency) who purchases and re-sells coal to coal deal-

ers or to consumers without physically handling it on, over or through his own vehicle, dock, trestle or yard.

2. For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of 15c per ton of 2000 lbs., nor shall the combined gross margins of any number of jobbers who buy and sell a given shipment or shipments of bituminous coal, exceed 15c per ton of 2000 lbs." (See General Orders, Regulations and Rulings of the United States Fuel Administration, p. 444; Appendix, p. 13....)

The indictment then alleges that during the months of September, October and November, 1917, a state of war was then existing between the United States and the Imperial German Government, and the law, orders and regulations above stated being then in force, defendant, The Matthew Addy Company, was engaged, in business in the city of Cincinnati, Hamilton county, Ohio, as a coal jobber, as defined in said executive order.

These preliminary statements contained in the first count are incorporated by reference into each of the other twenty-two counts, and each count then alleges a specific sale of coal by defendant company in supposed violation of the provisions of the act of Congress of August 10, 1917, and said executive order. The allegations of the second count (we omit the first because it was found that the court had no jurisdiction thereof, and it was dismissed) being that:

"Said The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Fred R. Kluckhohn doing

business in Napersville, Illinois, for a certain quantity of bituminous coal, to wit, about 49.85 tons of 2000 lbs. each of Pocahontas run-of-mine coal, a price of three dollars and fifty (\$3.50) cents per ton f. o. b. at the mines producing said coal, which said price of three dollars and fifty (\$3.50) cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of twenty-five (25c) per ton, and which said profit or margin of 25c per ton was, and was well known by the said The Matthew Addy Company to be in excess of the profit or gross margin of 15c per ton of 2000 lbs. permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Fred R. Kluckhohn, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed," etc. (R. 3.)

Motion to quash the indictment and demurrer were overruled prior to the trial (R., 21, 23); reported in 263 Fed., 449; 265 Fed., 424.

For the convenience of the court there is printed at the end of this brief an appendix giving the sections of the Lever Act and the principal orders and regulations of the President and the United States Fuel Administrator, involved in this case.

ERRORS RELIED ON.

The assignment of errors appears at R. 68.

The first error of the court and fundamental question in the case is raised by the seventh assignment, which is as follows:

“In charging the jury that defendant might be found guilty for violation of the order of the President of August 23, 1917, although the undisputed evidence showed that in respect to each transaction covered by the indictment, the coal had been purchased by The Matthew Addy Company prior to that day and prior to August 10, 1917.” (R., 70.)

Second. The court erred in not permitting defendant to prove that the gross margin of 15 cents per ton added to its purchase price, “was confiscatory and compelled defendant to dispose of its product without allowance for expenses and a just compensation for its services.”

If permitted to answer, the witness would have testified that in the month of September, in respect to gross sales of coal, in the month of September, 1917, they amounted to 25,315 tons.

That he had set off against the total amount of money received therefor all items of expense, to wit, the net direct expenses for coal sales, the net overhead expenses properly chargeable against coal sales, the coal sales expenses of the Chicago branch and the total expenses of net and overhead of the Chicago branch, and dividing the remainder by the number of tons found with the cost of coal sales in cents per ton for seven months was 17

cents and nine mills (\$0.179). Upon the same computation for the month of October, 1917, that the cost of coal sales in cents per ton per month, was 18 cents and twenty-two mills (\$0.1822); that applying the same computation to all coal sales of said company for the year 1917, he found the average selling cost to be 18 cents and 95 mills (\$0.1895). That further for the year 1918, the average cost of actual coal sales of the company, in cents per ton per month, amounted to 17 cents and nine mills (\$0.179). And for the year 1919, the average cost per month of actual coal sales of said company was 27 cents and six mills (\$0.276); and for the months of January, February and March, 1920, the average cost was 19 cents and thirty-one mills (\$0.1931).

Defendant offered the detailed statement prepared by the witness Frank C. Deckebach, dated May 17, 1920, covering said period from January 1, 1917, to March 31, 1920, showing all items, and made as aforesaid, from the original books, vouchers and other papers of said The Matthew Addy Company.

Defendant's counsel stated that said testimony and said analysis cost of coal sales was offered in evidence for the purpose of showing that defendant's price of \$3.50 per ton upon the sales stated in the indictments did not include a profit, as alleged in the indictment, in excess of 15 cents per ton; and further, for the purpose of showing that said order of August 23, 1917, if it limited the gross price per ton upon the coal purchased prior to the order by defendant, to a maximum of 15 cents, was confiscatory and compelled defendant to dispose of his products without allowance for expenses and a just

compensation for his services. And further, said evidence was offered for the purpose of showing that said order so interpreted did not conform to the act of Congress and especially paragraph 15 of Section 25 therein, which provides that:

“In fixing the prices for dealers, the commission shall allow the cost of the dealers and shall add thereto a just and reasonable sum for his profit in the transaction.”

Said statement referred to in the testimony of the witness Frank C. Deckebach was submitted, marked for purpose of identification, “Defendant’s Exhibit C.” (See proffert at R. 57-58, and assignments of error 3 and 6, R. 70.)

Third. The court erred in overruling the motion of defendant to quash the indictment and each and every count thereof, for the reasons urged in said motion. (R. 20.)

Fourth. The court erred in overruling the claims of defendant that the statute and the executive order, upon which the indictment was based, were, as construed by the court and applied to the undisputed facts, in violation of the several constitutional provisions specially relied on. (See demurrer to indictment, R. 21, and motion in arrest of judgment, R. 27.)

Fifth. The court erred in not directing a verdict for defendant, on the ground that the proof failed to sustain the indictment.

OUTLINE OF THE ARGUMENT.

I.

The court misconstrued the executive order upon which the indictment was based as applied to the undisputed facts.

II.

The court erred in not permitting defendant to show what were its costs and profits.

III.

The court erred in overruling the motion of defendant to quash the indictment and each and every count thereof, for the reasons, that—

(a) The indictment and each of its several counts is insufficient in law and fact.

(b) The allegations of the indictment are indefinite as to material matters and were not sustained by the evidence.

IV.

The court erred in overruling the demurrer of defendant to the indictment, which attacked the constitutionality of the Act of Congress of August 10, 1917, commonly known as the "National Defense (Lever) Act" (40 Stat., 278; Comp. Stat., 1919, Sec. 3115½ q.), and the executive order of the President, dated August 23, 1917, for the reasons, that—

(a) They violate the fifth amendment to the Constitution of the United States in that, defendant is deprived of its property without due process of law.

(b) The Act of Congress violates Section 1, of Article 1; Section 1 of Article 2, and Section 1 of Article 3 of the Constitution of the United States, in that it delegates legislative and judicial powers to the President of the United States, to the United States Fuel Administrator appointed by the President, and the Federal Trade Commission.

(c) The Act of Congress violates clause 1 of Section 8 of Article 1, and clause 2 of Section 8 of Article 1, of the Constitution of the United States, in that it is an abuse of the power given to Congress to provide for the national security and defense.

(d) The Act of Congress violates the tenth amendment to the Constitution of the United States, in that it interferes with the rights of the respective states, as to regulation of industries within the states.

ARGUMENT.**I.****THE COURT MISCONSTRUED THE EXECUTIVE ORDER UPON WHICH THE INDICTMENT WAS BASED, AS APPLIED TO THE UNDISPUTED FACTS.**

By Section 25 of the "National Defense (Lever) Act," approved August 10, 1921, it was provided:

"That the President of the United States shall be, and he is hereby, authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, whenever and wherever sold, either by producer or dealer, to establish rules for the regulation of, and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign; said authority and power may be exercised by him in each case through the agency of the Federal Trade Commission during the war or for such part of said time as in his judgment may be necessary."

By an order issued August 21, 1917, effective that day, the President fixed a scale of prices for bituminous coal at the mines in most of the coal producing districts. The price fixed for the kind of coal involved in this case, to-wit: West Virginia run-of-mine was \$2.00 per ton of 2,000 lbs. f. o. b. mines.

On August 23, 1917, the President issued an order fix-

ing the price on anthracite coal throughout the anthracite producing regions, to become effective September 1, 1917. The same order contained the "Jobber's Margin," and provided:

"1. A coal jobber is defined as a person (or other agency) who purchases and resells coal to coal dealers or to consumers without physically handling it on, over, or through his own vehicle, dock, trestle or yard.

2. For buying and selling anthracite coal a jobber shall not add to his purchase price a gross margin in excess of 20c per ton of 2,240 pounds when delivery of such coal is to be effected at or east of Buffalo. For buying and selling anthracite coal for delivery west of Buffalo a jobber shall not add to his purchase price a gross margin in excess of 30c per ton of 2,240 pounds. The combined gross margins of any number of jobbers who buy and sell a given shipment or shipments of anthracite coal for delivery at or east of Buffalo shall not exceed 20c per ton of 2,240 pounds, nor shall such combined margins exceed 30c per ton of 2,240 pounds for the delivery of anthracite coal west of Buffalo. Provided that a jobber's gross margin realized on a given shipment or shipments of anthracite coal may be increased by not more than 5c per ton of 2,240 pounds when the jobber incurs the expense of rescreening it at Atlantic or lake ports for trans-shipment by water."

(See General orders, regulations and rulings of the United States Fuel Administrator, p. 444; Appendix, p. ~~62~~.)

The evidence shows without dispute that defendant bought the coal July 31, 1917, for \$3.25 per ton f. o. b. mines, or \$1.25 per ton more than the price f. o. b. mines fixed by the President's order of August 21, 1917; and that it sold it in August and September for \$3.50 per ton.

The plain meaning of the executive order of August 23, 1917, is, that after the going into effect of that order, a jobber is prohibited from adding to his purchase price a gross margin in excess of 15c per ton "for the buying and selling of bituminous coal" and the order has no application to a transaction whereby a jobber, having bought coal prior to August 23, 1917, sells it thereafter. In other words, the order must be construed as prospective only, and prospective in respect to all of its elements; that is to say, to both the buying and selling of a given lot of coal.

It appears from the several orders of the President, which were judicially noticed by the court, that on August 23, 1917, the President, under authority of the law, had adopted a comprehensive scheme, fixing the prices at the mines throughout the country, for both bituminous and anthracite coals, and in connection therewith, provided the jobbers' margins for "the buying and selling" of both classes of coal.

The court below either treated the words "buying and," in the phrase "for the buying and selling of," as if they were not included in the order, or else the court has given to the order a retroactive operation, by holding that the "buying" of a particular shipment by a jobber, which is an essential part of the offense and necessary to constitute it, may be punishable, although it occurred prior to the enactment of the law.

By the order of August 23, 1917, in the first section thereof, the President carefully defined coal jobbers, in a clause inserted only for the purpose of so defining those

words and complete in itself. Having thus defined, or described **the persons** (descriptive personnel) who are capable of committing the specific offense, the President proceeded to define **the acts** which constitute the offense. Both in respect to the dealings in bituminous coal by a single jobber, or several jobbers, and in respect to dealings in anthracite at or east of Buffalo and anthracite west of Buffalo, in each case, by a single jobber, or several jobbers, he separately and distinctly provided that it was "**for the buying and selling**" that the jobber should add to his purchase price not more than a particular "**gross margin.**"

In doing so the president must be supposed to have had in mind the nature of a jobber's business, and his necessary relationship to a given transaction. A jobber does not produce coal and sell it, but buys it and sells it. The transactions whereby he purchases, necessarily involve an expense to him just as much as do the transactions whereby he sells with the additional intermediate expense which results from carrying unsold coal, equal in any event to the loss of interest on the money invested. In respect to his business of purchasing and carrying he is entitled to his cost and compensation for his services.

Having these facts in mind, the president wisely and fairly treated the relationship between a jobber and a particular transaction, or to use the words of the order, his relation to "**a given shipment or shipments**" as a unit. No permissible legal construction of the order can be adopted, which attributes to the president an intention to limit a jobber to a gross margin in the selling of a

particular shipment, which might well be less than the expense already incurred by him in the purchase thereof, prior to the promulgation of the order.

In the present case and in many possible cases there might be shipments of coal in the hands of jobbers on August 23, 1917, theretofore purchased by them, in respect to which their expense connected with the purchase and carrying already exceeded the gross margin of 15c permitted by the order of that day. If the order of that day had the effect of compelling such jobbers to dispose of such shipments at a loss, or in the alternative, subject themselves to the penalties against "hoarding" provided in Section 26 of the law, the law itself would be open to grave constitutional objections. Whereas, no such objections could be raised, if the order is prospective only, and to be applied only to such jobbers as might see fit after the promulgation of the order, to engage in the business "of buying and selling."

We have already referred to the fact that by the two orders of August 21st and August 23rd, the president adopted a comprehensive schedule of prices for coal, both bituminous and anthracite, at the mines, throughout the country. We submit that the adoption of such a schedule of prices, taken in connection with the clear wording of clauses 2 and 3 of the order of August 23rd, shows that it was for the **buying and selling thereafter of coal**, the price of which at the mines was that day fixed, that the jobbers' margins were fixed.

This construction indicates a comprehensive, intelligible purpose, and gives effect to all the words of the order according to their plain English significance.

All of the sales by defendant, covered by the indictment were in the months of August and September, but the offense of which defendant was convicted was not the offense charged in the indictment or defined by any order in force in August and September, but was, if anything, an offense in violation of a subsequent order of October 6, 1917, of which paragraph 9 provided:

"A jobber who, at the time of the President's order fixing the price of the coal in question at the mine (the order of August 21), had contracted to buy coal at or below the President's price, and at that time had no contract to sell such coal, shall not sell the same at a price higher than the purchase price plus the proper jobber's commission as determined by the President's regulation of August 23, 1917." (General Orders, Regulations and Rulings of the United States Fuel Administrator, p.; Appendix p. 82....)

The issuance of the order of October 6th shows conclusively that prior to that day it was not considered an offense for a jobber who had purchased coal prior to August 23rd to sell the same at any price obtainable on the market.

The principle is well established that laws, especially laws creating crimes, are not to be given a retroactive effect unless the legislative intention that they shall have such effect is clear. This is especially true when the retroactive construction throws doubt upon the constitutionality of the law.

In the case of *Shwab vs. Doyle*, Collector of Internal Revenue, 258 U. S. 529, 42 Sup. Ct. Rep. 391, which in-

volved the question of retroactive construction of a law of the United States, this court held:

"1. Laws are not to be construed as applied to cases which arose before their passage, unless that intent be clearly declared, since there is absolute prohibition against such laws when their purpose is punitive, and the situation which impells prohibition in such cases exacts clearance of declaration in other cases."

At page 534 of the opinion, this court said:

"The Act of September 8, 1916, is within the condemnation. There is certainly in it no declaration of retroactivity, 'clear, strong and imperative,' which is the condition expressed in *United States vs. Heth*, 3 Cranch 399, 413, etc.

"If the absence of such determining declaration leaves to the statute a double sense, it is the command of the cases that that which rejects retroactive operation must be selected."

In the course of the opinion by Mr. Justice Harlan, in *Chew Heong vs. United States*, 112 U. S. 536, 559, it was said:

"The courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature. In *United States vs. Heth*, 3 Cranch, 398, 413, this court said, that 'words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied;' and such is the settled doctrine of this court. *Murray vs. Gibson*, 15 How. 421, 423; *Mc-*

Ewen vs. Den, 24 How. 242, 244; Harvey vs. Tyler, 2 Wall. 328, 347; Sohn vs. Waterson, 17 Wall. 596, 599; Twenty Per Cent. Cases, 20 Wall. 179, 187."

See also opinion of Mr. Justice Day in *White vs. U. S.*, 191 U. S., 545, at page 552.

Queen vs. Griffiths (1891), 2 Q. B. 145 involved the commission of a misdemeanor under a bankruptcy law, in which the conviction was reversed. Chief Justice Coleridge stated the principle governing such cases as follows:

"The question raised in this case is no doubt very capable of argument on both sides; but on the whole I think it is safer to hold that s. 26 of the Bankruptcy Act, 1890, is not retroactive in its operation, and that where a person is accused of an offense created by that Act, as applied to the Debtors Act, 1869, all the ingredients of the offense must have taken place before January 1, 1891, upon which date the Act of 1890 came into operation. I think that the words in s. 26 'shall have effect' must mean 'Shall have effect from January 1, 1891.' It is admitted that but for the alteration in the law effected by the 26th section, the acts committed by this defendant would not have constituted an offense, because they were committed before the presentation of a bankruptcy petition by himself; but it has been argued that the effect of s. 26 is to constitute those acts an offense. The question is, from what point of time does s. 26 take effect? I am of opinion that it takes effect from January 1, 1891. That conclusion is supported by the view that to give a retrospective effect to the statute would be to deprive the defendant of a defense upon which, at the time the acts complained of were committed, he was entitled to rely. It seems to me a very strong thing to hold that a defense which was open to a man at the time he did the acts complained of has been taken away by the retrospective operation of a subsequent statute. No authority in support of such a construction has been cited by us. I think it is safer

to hold that all the ingredients of the offense must have taken place before the Bankruptcy Act, 1890, came into operation, and I am therefore of opinion that this conviction cannot be sustained."

See also U. S. vs. Starr, Fed. Cas. No. 16379.

The learned trial judge was of opinion (see Ruling on Motion for a New Trial, R. 24) that because it was stated as a recital of fact in one of the orders of the Fuel Administration (Order of November 8, 1917) that the "coal mine output was largely contracted to be sold in advance," that the order of August 23rd, if not construed so as to penalize the sale by jobbers thereafter, of coal previously purchased by them, would leave it "open to the jobber to demand what he could get for his coal, and to thus carry on the injurious speculation, manipulation and private control of the supply which the Act was designed to prevent."

We submit that this is not a permissible method of legal reasoning for the construction of a law creating a criminal offense. There is nothing to indicate that when the order of August 23rd was issued, the President had any information concerning the amount of coal at the mines already contracted for, or whether the condition in fact existed on August 23rd. In any event, and even assuming that the condition did exist, by reason of the fact that only eleven days had elapsed since the passage of the Lever Law, and there had been no intervening investigation, it seems clear that he was not in possession of any such information.

As stated in the opinion of Circuit Judge Denison, in

One Truckload of Whisky vs. U. S., 274 Fed. 99; "The case is one for the application of the rule that a statute of this character, creating a new offense, should not be extended to include acts which may or may not have been within the legislative intent;" citing:

U. S. vs. Bathgate, 246 U. S. 220.

U. S. vs. Weitzel, 246 U. S. 533.

In the latter case Mr. Justice Brandeis, delivering the opinion of this court, at page 543 said:

"Furthermore, a **casus omissus** is not unusual, particularly in legislation introducing a new system. The fact that in 1879 Congress should have found it necessary to enact a general law for the punishment of officers of the United States who embezzle property entrusted to them, but not owned by the United States, shows both how easily a **casus omissus** may arise and how long a time may elapse before the defect is discovered or is remedied. Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive. *Todd vs. United States*, 158 U. S. 278, 282; *United States vs. Harris*, 177 U. S. 305."

See also Lewis' Sutherland on Statutory Construction at Section 520.

In the case of *Ex parte Bailey*, 39 Fla. 76, the court stated:

"A penal law must be construed strictly and according to its letter. Nothing is to be regarded as included within it that is not within its letter as well as its spirit; nothing that is not clearly and intelligibly described in its very words, as well as manifestly intended by the legislature, and where a penal statute contains such an ambiguity as to leave

reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of life or liberty, is to be preferred."

To say the least the law and the early rules and regulations of the President and the United States Fuel Administrator were ambiguous, difficult to interpret and were not clearly interpreted until the order of October 6, 1917, (General Orders, Regulations and Rulings of the United States Fuel Administrator p., appendix p. 84) which was after the alleged offense charged in the indictment in this case. The violation, if there was any, on the part of petitioner was certainly not wilful as the evidence discloses, but merely because of the difficulty in interpreting the rulings of the Fuel Administrator. Immediately after the order of October 6th was issued, petitioner charged only 15 cents per ton as commission on the cars of coal purchased in July but remaining unsold at that time. The trial court ignored these facts entirely.

In the case of "The Schooner Enterprise," 1 Paine 32, at page 33, the court, in construing a penal statute, said among other things:

"For although ignorance of the existence of a law be no excuse for its violation, yet if this ignorance be the consequence of an ambiguous or obscure phraseology, some indulgence is due to it. It should be the principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offense unless it be created and promulgated in terms which leave no reasonable doubt of their meaning. If it be the duty of a jury to acquit where such doubts exist concerning a fact, it is equally

incumbent on a judge not to apply the law to a case where he labors under the same uncertainty as to the meaning of the legislature. If this be involved in considerable difficulty from the use of language not perfectly intelligible, unusual circumspection becomes necessary—especially if the consequences be so penal as scarcely to admit of aggravation. When the sense of a penal statute is obvious, consequences are to be disregarded; but if doubtful they are to have their weight in interpretation. It will at once be conceded that no man should be stripped of a very valuable property, perhaps of his all—be disfranchised and consigned to public ignominy and reproach, unless it is very clear that such high penalties have been annexed by law to the act which he has committed. If these principles be correct, as they are deemed to be, a court has no option where any considerable ambiguity arises on a penal statute, but is bound to decide in favor of the party accused. ‘It is more consonant to the principles of liberty,’ says an eminent English judge, ‘that a court should acquit when the legislature intended to punish, than it should punish, when it was intended to discharge with impunity.’ ”

II.

THE COURT ERRED IN NOT PERMITTING DEFENDANT TO SHOW WHAT ITS COSTS AND PROFITS WERE.

If we are right in our first contention, the judgment should be reversed and it will be unnecessary for the court to consider the other assignments of error. If we are not sustained in that argument, the question remains whether the defendant was not entitled to show that 15c per ton added as its commission to its purchase price resulted in loss or inadequate compensation.

The order of August 23, 1917, provides in terms that "For the buying and selling of bituminous coal, a jobber shall not add to his purchase price a gross margin in excess of 15c per ton." But the question is, whether the President had power under the law to limit the "gross margin" or commission of the jobber to a commission which resulted in no compensation adequate to the jobber's services, or as in this case to a loss because the selling price averaged less than the cost. This question was raised at the trial by the request for Special Charge No. 2 (R. 61):

"If you find from the evidence that the gross margin of 15c per ton for jobbers as fixed by the President on August 23d, 1917, does not include defendant's costs of doing business and a just and reasonable sum for profit, then I charge you as a matter of law that you must return a verdict of 'not guilty.'"

This charge was refused and exception reserved and is preserved by the third assignment of error. (R. 70):

"In sustaining the objection of counsel for the government to the defendant's offer to prove that the profit of The Matthew Addy Company, on each and every transaction upon which the indictment and the several counts thereof were based was not in excess of 15c per ton of 2,000 lbs."

And in the sixth assignment. (R. 70):

"In charging the jury that the word 'profit' in the indictment, at each of the places where said word appears, was the equivalent of the words 'gross margin,' and in charging the jury that they might return a verdict against defendant in the absence of proof that The Matthew Addy Company made a profit per ton on the coal covered by the indictment, in excess of 15c."

The Government offered no evidence to show that any part of the commission or margin of 25c, added by defendant to its purchase price, was profit.

The defendant offered to show and had incorporated into the record in connection with the evidence of Frank C. Deckebach (R. 55), a certified public accountant, comprehensive tabulations from its books showing the cost and expense of its business in cents per ton, not only for the months covered by the indictment, but prior and subsequent thereto. (Schedules, R. 117 to 122.) In the nature of things it was impossible to distribute and allocate to the particular shipments involved in the indictment, the proper proportion of the company's total expenses rightly allowable as selling cost. But by a distribution of all costs against all sales, it was shown that for the month of July, 1917, the cost of selling a ton of coal was \$.3425, or more than 9c over the total commission of 25c which the company added to its selling price of the coal purchased by it from Bluefield Coal and Coke Company for \$.325 per ton on July 31st, 1917, (Government Exhibits 1 and 2, R. 74). For the month of August, 1917, the company's selling cost per ton was \$.1457, or a fraction of a cent less than the 15c per ton commission allowed by the executive order. For the month of September the company's selling cost per ton was \$.1790, or nearly 3c in excess of the commission allowed. The evidence was rejected, the special charge refused, and the jury instructed that the results of the purchases and sales by defendant by way of profit or loss were immaterial.

We have already quoted, at page, the section of the act which authorizes the President to fix the price of coal and coke, and provides that such "authority and power may be exercised by him in each case through the agency of the Federal Trade Commission," etc. In overruling a motion to quash the indictment, the district judge held that the word "may" in this clause is permissive, and that the President is not required to exercise his authority to regulate the prices through the Federal Trade Commission; and the judgment below was a conviction upon the order of the President of August 23, not concurred in or promulgated by the Federal Trade Commission.

In order to properly construe the law it should be noted that where the Federal Trade Commission undertakes to fix prices, it must, under paragraph 11 of Section 25, "make full inquiry, giving such notice as it may deem practicable, into the cost of producing," etc., and that having completed such inquiry it shall (Par. 14):

"In fixing maximum prices for producers * * * allow the cost of production, including the expense of operation, maintenance, depreciation, and depletion, and shall add thereto a just and reasonable profit;"

and in Paragraph 15 it is further provided that:

"In fixing such prices for dealers, the Commission shall allow the cost to the dealer and shall add thereto a just and reasonable sum for his profit in the transaction."

The purpose and intent of the law as a whole was not to confiscate, during a public emergency, either the prod-

net of the producer or the good will or services of the dealer or jobber, but to regulate prices after inquiry, and under the ordinary constitutional limitations. And even if it be true that the immediate emergency justified the President in fixing jobbers' prices, instead of adopting the slower method of submitting them to the Federal Trade Commission to be fixed upon investigation, we submit that the President, in exercising such power in emergency, was not free from the limitations imposed upon the Federal Trade Commission in the event that it should exercise the same powers by direction of the President.

We submit that where the President, without investigation, fixed a dealer's or jobber's price, without allowing "the cost to the dealer and adding thereto a just and reasonable sum for his profit," the dealer or jobber may show upon an indictment based upon Paragraph 17, for violation of an order of the President, that the price fixed by the order did in fact not allow "a just and reasonable sum for his profit in the transaction," but actually resulted in a loss.

III.

THE COURT ERRED IN OVERRULING THE MOTION OF DEFENDANT TO QUASH THE INDICTMENT AND EACH AND EVERY COUNT THEREOF.

(a) The Indictment and Each of its Several Counts, is Insufficient in Law and Fact.

The district judge, in his opinion of February 26, 1920, overruling defendant's motion to quash the indictment (R. 21), disposed of our first contention on this point in the following language:

"The indictment is sufficient. The word 'may' in the last clause of the first paragraph of Section 25 of the National Defense (Lever) Act (40 Stat., 276) is permissive. The President is thereby empowered, not required, to exercise his authority to regulate the prices and production of coal through the Federal Trade Commission in each instance. This is the ordinary significance of the word. *U. S. vs. Lexington Mill Co.*, 232 U. S., 399, and that it was so intended is clear from the context. It may be noted that the third paragraph vests in the President a similar optional discretion to act through the Commission or otherwise." (R. 21.)

We submit that this construction of the law is not correct.

Paragraph one, which authorized and empowered the President to fix the price of coal and coke, and to establish rules for the regulation of and to regulate the method

of production, sale, shipment, distribution, apportionment or storage, is a startling innovation in legislative action, due to the exigencies of war. If Paragraphs 1 and 17 had stood alone, without the inclusion of the intermediate paragraphs, the construction adopted by the District Court and approved by the Court of Appeals, might have been necessary, but reading the section as a whole we submit that there was no intention on the part of Congress to authorize the President to fix, without investigation or notice to be heard or appeal, either prices or jobbers' commissions on the sale of coal and coke. This is apparent from the provisions of the sections other than 1 and 17.

Paragraphs 2, 3 and 4 relate to the requisition of "the plant, business and all appurtenances * * * belonging to such producer as a going concern," and their operation during the period of the war.

Paragraph 3 provides that in case of such requisition "a just compensation for the use thereof" shall be paid, which compensation the President shall fix or cause to be fixed by the Federal Trade Commission, and paragraph 4 provides that in case of requisition, if the compensation fixed be not satisfactory to the owner, he shall, upon payment to him of 75% of the amount fixed, "be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation."

Paragraphs 6, 7 and 8 provide an alternative to requisition of the plants of producers and dealers. That is, "an agency to be designated by the President," to which

producers shall sell their products, the prices to be fixed and regulated by such agency.

By paragraph 8 it is provided, that:

“The prices to be paid for such products so purchased shall be based upon a fair and just profit over and above the cost of production, including proper maintenance and depletion charges, the reasonableness of such profits and costs of production to be determined by the Federal Trade Commission,”

with further provision that in case the owners are dissatisfied with the prices so fixed, they shall be paid seventy-five percentum of the amount, with the right to bring suit to recover the actual value of their product, to be determined by the courts.

Paragraphs 11, 12, 13, 14 and 15 prescribe the procedure whereby the President is to make inquiry into the cost of producing coal and coke, and paragraph 13 provides that “If the President had decided to fix the prices at which any such commodity shall be sold by producers and dealers generally” the Federal Trade Commission shall “fix and publish maximum prices for both producers of and dealers in any such commodity,” etc.

Paragraph 17 provides a punishment for any one who, with knowledge that the prices of any such commodity have been fixed as therein provided, violates them.

The Federal Trade Commission is required by Sections 14 and 15, in fixing maximum prices, both for producers and dealers, to allow the cost of production, or service, and “add thereto a just and reasonable sum of the profit in the transaction.” We submit that paragraph 1, properly construed, and considered as a part of the entire

statute, cannot be casually disposed of by merely defining "may" therein as permissive; that the proper construction of paragraph 1, conferring unusual powers upon the executive, also defined the only manner in which such powers could be exercised, and that the word "may" is equivalent, as it frequently is, to the word "shall," and refers to the special requirements of paragraphs 11, 12 and 13, inclusive, in providing the method whereby the President is authorized to fix prices for "producers or dealers."

Paragraph 16 strongly enforces our contention as to the proper construction of the statute. It reads:

"The maximum prices so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith, prior to the establishment and publication of the maximum prices by the commission."

During the course of the trial it was recognized that this paragraph was applicable to the maximum commission fixed by the President, for violation of which defendant was indicted. But the paragraph did not undertake to preserve the inviolability of the contracts as against prices fixed by the President, but only as against prices fixed by the commission. If the Government's construction of paragraph 1 is correct, there would appear to be no sound rule of construction which would permit paragraph 16 to make an exception to the unlimited power conferred on the President by paragraph 1.

If our construction of the statute is correct, it follows that:

The indictment should allege the passage of the Act and the principal provisions thereof and then that the

President having decided to fix prices at which coal and coke might be sold, that the Federal Trade Commission fixed and published maximum prices for dealers in such commodities and that after such prices were fixed and published, defendant, with knowledge thereof violated same by asking, demanding and receiving higher prices than those fixed.

Nowhere in the indictment does it appear that the Federal Trade Commission fixed and published maximum prices and that defendant had notice thereof. If the Federal Trade Commission did not in fact fix and publish maximum prices and defendant did not in fact know or could not have known of any fixing of prices by it, then the defendant has violated no law and should not have been compelled to plead to any such indictment.

It is a well recognized rule in criminal pleading, that no material allegation may be omitted, for without it, a criminal offense is not described.

In the case of *United States vs. Hess*, 124 U. S. 483, at page 486, it was held:

"The general, and with few exceptions, of which the present is not one, the universal rule on this subject, is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly and not inferentially, or by way of recital."

See also *Ledbetter vs. United States*, 170 U. S. 606.

The rule just quoted applies equally to common law offenses as to statutory offenses. In an indictment for a purely statutory offense, the reason for the rule is all the more evident, for a common law crime may become

defined through legislative and judicial interpretation, besides the influence of public opinion regarding the law, during many years of its effectiveness.

In the case of *United States vs. Cruikshank, et al.*, 92 U. S. 542, it was held:

“In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right ‘to be informed of the nature and cause of the accusation.’ The indictment must set forth the offense with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged; and every ingredient of which the offense is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading, that, where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species, it must descend to particulars. The object of the indictment is—first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.”

For the reason that essential and necessary allegations are not alleged in the indictment, we submit that the motion to quash should have been granted.

(b) The Allegations of the Indictment Are Indefinite as to Material Matters and Were Not Sustained by the Evidence.

The indictment fails to state an essential allegation, namely, that the Federal Trade Commission had fixed maximum prices and published same, at which coal and coke should be sold by producers and dealers generally. It is left for inference that the Federal Trade Commission did publish such maximum prices and that the defendant knew or should have known of the fixing of same.

Averments must be made positively and not by intentment or argument.

In *Drake vs. State*, 19 Oh. St. 211, it was said:

“An intent to prejudice, damage, or defraud is an essential ingredient in the crime of forgery; and an indictment for that crime must, therefore, charge such intent directly and specifically; and a mere statement of such intent, in the conclusion of the indictment, by way of legal deduction or inference from the facts previously found is insufficient.”

See also *Fouts vs. the State*, 8 Oh. St. 98. To the same effect is *U. S. vs. Cruikshank*, 82 U. S. 542, *supra*.

In *United States vs. Carll*, 105 U. S. 611, defendant was charged with feloniously and with intent to defraud, passing, uttering and publishing a falsely made, forged, counterfeited and altered obligation of the United States. In the course of his opinion, at page 612, Mr. Justice Gray said:

“In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the

statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on like matters, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

In *Pettibone vs. United States*, 148 U. S. 197, where defendant was charged with endeavoring to influence, intimidate, or impede an officer in a court of the United States in the discharge of his duty, by threats or force, the court said:

"An indictment against a person for corruptly or by threats of force, endeavoring to influence, intimidate, or impede a witness or officer in a court of the United States in the discharge of his duty, must charge knowledge or notice, or set out facts that show knowledge or notice, on the part of the accused that the witness or officer was such.

A person is not sufficiently charged in such case with obstructing or impeding the due administration of justice in a court, unless it appear that he knew or had notice that justice was being administered in such court."

See also *DuBrul vs. State*, 80 Oh. St. 52.

Dillingham vs. State, 5 Oh. St. 280.

Lane vs. State, 39 Oh. St. 312.

Redmond vs. State, 35 Oh. St. 81.

United States vs. Burns, 54 Fed. 351.

Hague vs. United States, 154 Fed. 245.

Rosen vs. United States, 161 U. S. 29.

United States vs. Hess, *supra*.

The indictment, as has been shown, was based upon the alleged failure of defendant to obey a regulation prescribed by the President, under the power conferred on him by paragraph 1 of Section 25 of the Act, and the penalty imposed was that provided for in paragraph 17 of Section 25. The regulation, quoted in full at page —, *supra*, was:

“For the buying and selling of bituminous coal a jobber shall not add to his purchase price a **gross margin** in excess of 15c per ton of 2,000 lbs.,” etc. (Black face type ours.)

The indictment charged (second count, R. 3) that defendant—

“feloniously did ask, demand and receive from Fred R. Kluckhohn, doing business at Naperville, Illinois, for a certain quantity of bituminous coal, to wit, about 49.85 tons of 2,000 lbs. each of Pocahontas run-of-mine coal, a price of three dollars and fifty (\$3.50) cents per ton, f. o. b. at the mines producing said coal, which said price of three dollars and fifty (\$3.50) cents per ton included a **profit or gross margin to it**, said The Matthew Addy Company, as such coal jobber, as aforesaid, of twenty-five (25) cents per ton, and which said **profit or margin** of twenty-five (25) cents per ton was and was well known by said The Matthew Addy Company, to be in excess of the **profit or gross** margin of 15 cents per ton of 2,000 lbs. permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber,” etc. (Black face type ours.)

At the trial the Government, after first stating that it proposed to prove that the 25c a ton commission was a **profit** of 25c, was permitted by the court to abandon, and

did abandon any pretense of proving that the 25c a ton commission, or any part thereof, was profit (R. 30, 31). Defendant, by special charge No. 6 (R. 61), which was refused, asked the court to instruct the jury as follows:

"The indictment charges in each count that the price of \$3.50 per ton demanded and received by the defendant The Matthew Addy Company, included a profit or gross margin of 25 cents per ton, which was in excess of the profit or gross margin of 15 cents per ton fixed by said order of August 23, 1917. Profit, in these indictments, means the amount or sum remaining after the deduction of all cost and expense; and I charge you, that unless you find, beyond a reasonable doubt, that said sum of 25 cents per ton added by defendant The Matthew Addy Company to its purchase price of \$3.25 per ton, included a profit, as above defined, in excess of 15 cents per ton, you shall find defendants and each of them not guilty."

The court charged the jury, at R. 64, as follows:

"I charge you that 'profit' as there used, means the same as gross margin, that is, the difference between the purchase price and the selling price," etc.

At the close of the charge (R. 67) defendant's counsel stated:

"We would like to reserve an exception to that part of the charge in which the court defined 'profit' as being equivalent to gross margin, and also a general exception to the charge."

In the assignments of error (6 on R. 70) the exception was preserved. The objection on the ground of indefiniteness had already been raised and overruled by the

motion to quash, and was also preserved by the ninth assignment of error (R. 70).

"Profit" does not, as matter of law, or according to its ordinary English significance, mean the same as "gross margin." On the contrary, gross margin means the total amount received by the jobber from his customer, over and above his, that is the jobbers' purchase price; whereas his **profit** is the gross margin **less his** expense. This is clearly recognized in the statute; see clause 15 of Section 25 where it is provided:

"In fixing such prices for dealers, the commission shall allow the cost to the dealer and shall add thereto a just and reasonable sum for his profit in the transaction."

In *Rubber Company vs. Goodyear*, 9 Wall., 788, it is stated:

"Profits . . . within the meaning of the law, are to be computed and arrived at by finding the difference between the cost and yield. In estimating the cost, the elements or price of materials, interest, expenses of manufacture and sale, and other necessary expenditures, if there be any, and paid debts, are to be taken into account . . . 'Profit' is the gain made upon any business or investment, when both the receipts and payments are taken into account."

In *Curry vs. Charles Warner Company* (Del.) 42 Atl. 425, 428, it is stated:

"The word 'profit' is one in common use, unambiguous, and primarily means acquisition beyond expenditure, or the excess of sale or value received over cost. Has it any other or peculiar meaning in this contract? If not, the word is to be construed in its plain, ordinary and familiar sense."

The words "profit" and "gross margin," not being identical, the error of the court in stating that they were, must be presumed to be prejudicial to the defendant. The Lever Law was commonly known as a law against "profiteering," which, as the court knows, was a subject of much discussion and considerable public indignation at the time of the trial. The Government was permitted to allege that the 25c per ton added by defendant to its purchase price was "profit," but was relieved of the necessity of proving that any part of it was profit.

On the other hand, defendant was not permitted to show the contrary, and the jury may therefore have very well supposed that the entire "gross margin" was "profit," and accordingly placed defendant in the much despised class of "profiteers."

IV.

**THE COURT ERRED IN OVERRULING THE DE-
MURRER OF DEFENDANT TO THE INDICT-
MENT, WHICH ATTACKED THE CONSTITU-
TIONALITY OF THE ACT OF CONGRESS OF
AUGUST 10, 1917, COMMONLY KNOWN AS THE
"NATIONAL DEFENSE (LEVER) ACT" (40
STAT. 278; COMP. ST. 1918, SEC. 3115¹/₈q) AND
THE EXECUTIVE ORDER OF THE PRESIDENT,
DATED AUGUST 23, 1917.**

- (a) **The Act of Congress and the Rules, Regulations, Promulgations and Publications of the President and the United States Fuel Administrator Violate the Fifth Amendment to the Constitution of the United States, in that Defendant is Deprived of its Property Without Due Process of Law.**

The first clause of Section 25 of the act, gives the President authority to fix the price of coal and coke. The eleventh clause provides that when directed by the President, the Federal Trade Commission is required to inquire as to the cost of production of coal and coke. The thirteenth clause provides that if the President has decided to fix prices and the Federal Trade Commission has completed its inquiry, **the Federal Trade Commission shall fix and publish maximum prices, which prices shall be observed by all producers and dealers.** (Black face type ours.)

Then in the fourteenth and fifteenth clauses, it is provided how maximum prices shall be arrived at. The seventeenth clause prescribed the penalty for not complying with the prices as fixed.

There is nothing in the act of Congress or in the regulations of the President thereunder, as they were construed and applied by the District Court, which provide for a hearing with regard to the fixing of prices. There is not even any semblance of a hearing either before the President or the Federal Trade Commission or a court. The President by himself or through the Federal Trade Commission may arrive at a price to be fixed, no matter how arbitrary or unreasonable, and every one within the meaning of the act must comply therewith. This is a taking of one's property or services without compensation and is purely confiscatory and within the prohibition of the amendment to the Federal Constitution. Assuming that the President has power to act without action by the Federal Trade Commission, there is nothing in the act of Congress which provides for the machinery to arrive at the cost of production. It is true the President may, if he sees fit, exercise his power through the agency of the Federal Trade Commission and the Federal Trade Commission may make inquiry as to the cost of production, but how they shall arrive at such cost of production, is not stated except that the act in clauses fourteen, fifteen and sixteen of Section 25 provides, "that in fixing maximum prices for producers, the commission shall allow the costs of production, including the expense of operation, maintenance, depreciation and

depletion and shall add thereto a just and reasonable profit."

"That in fixing such prices for dealers, the commission shall allow the costs to the dealer and shall add thereto a just and reasonable sum for his profit in the transaction."

"That the maximum prices so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith prior to the establishment and publication of maximum prices by the commission."

In the motion to quash the indictment (R. 20), which was overruled by the court, we contended that the word "may" as used in the first paragraph of Section 25 of the act of Congress in question should be read as "shall." That it was obligatory upon the President in all cases to exercise the authority therein vested in him, through the agency of the Federal Trade Commission.

The court below construed the phrase mentioned as being permissive on the part of the President, to exercise his authority through the agency of the Federal Trade Commission.

If the court's ruling on the motion to quash the indictment is correct, and as the act of Congress in question nowhere provides for an investigation by the President nor for any semblance of a hearing before him, the act of Congress in question is clearly invalid, as depriving defendant of its property without due process of law, and besides, the fact remains that the President has not exercised his authority through the Federal Trade Commission, which might have the machinery to provide for a hearing.

While the President is given the power to exercise his authority through the Federal Trade Commission, it is very apparent from his rulings and regulations, beginning with the first one under date of August 21, 1917, that he has not seen fit to use the agency of the Federal Trade Commission and that he has arbitrarily arrived at the maximum prices which he fixed in exercising that authority himself.

Nowhere in the act of Congress nor in any of the rulings and orders of the President, or the United States Fuel Administrator, is there a remedy provided for defendant, in the event that the prices as fixed were found not to include the cost of doing business, together with a fair profit, which the Federal Trade Commission is enjoined to allow dealers, when it (the Federal Trade Commission) investigates the cost of doing business and publishes maximum prices after the President has decided to fix prices of coal and coke.

Unlike the provision made in the act of Congress, for producers, who, in the event that their properties and output are commandeered by the President, may sue the United States, the defendant as a jobber, is entirely without remedy and if it exercises the privilege of charging a price which covers the cost of doing business, plus a fair profit, as the law intended for it to have, it is amenable to criminal proceedings, which impose a very heavy penalty.

If the law authorizes the President, by mere executive order without previous investigation to finally fix the jobber's compensation for his services without provision

for appeal, and does not permit the defendant to show upon the trial that the compensation so fixed is unfair and inadequate, the law is unconstitutional. Due process of law, as granted by the constitution, is not dependent upon the form of procedure, but there must be provided some fair method, either in advance or afterwards, for compensating the person whose property is taken, or whose service is compelled, for public or private uses.

It may be that where, upon investigation and hearing, a jobber's commission had been fixed for the trade in general, a particular jobber could not complain because of the fact that by reason of circumstances peculiar to him, the commission so fixed did not afford him adequate compensation. (See remarks of the district judge, R. 57.) But in this case there was no hearing or investigation prior to the order fixing the jobber's commission nor a pretense of any. The arbitrary jobber's commission embodied in the order of August 23rd, became effective thirteen days after the passage of the law itself. On September 6th, 1917, the United States Fuel Administrator, referring to the prices and commissions theretofore fixed, frankly stated that they had been fixed without investigation. He said: "The prices fixed are provisional. They will stand unless changed by order of the President for good cause shown. The Fuel Administration will examine all applications for revision of prices, accompanied by cost statements presented in writing." (See General Orders, Regulations and Rulings of the United States Fuel Administrator, p.; Appendix, p.) In fact they were afterwards changed several times and in many particulars.

The fixing of rates, charges or compensation for property taken, is certainly not an executive function. Where compensation for property taken is fixed by judgment of a court, it is always after hearing and investigation; where rates and charges are fixed by the legislature it is at least always presumed that investigation has been made.

If the President or other executive officer may exercise such power without investigation as was done in the present case, at least it must be open to the individual to show upon the trial that the enforcement of the order was confiscatory or non-compensatory as to him. This right was denied the defendant in this case.

What is "due process of law," has never been clearly defined by this court, except that it varies with the circumstances in each case.

A very good definition of "due process of law," as the term has been construed by this court and other courts of high standing, is that given by the Supreme Court of Iowa in the case of *Smith vs. State Board of Medical Examiners*, 117 N. W., 1116, in which case Smith's license to practice medicine was revoked. The court said:

"The essential elements of 'due process of law' are notice and opportunity to defend; but 'due process' does not require that any particular form of proceedings be observed, but only that the same shall be regular proceedings, in which notice is given of the claim asserted, and an opportunity afforded to defend against it."

In the case of Postal Telegraph Cable Company vs. Newport, 247 U. S., 464, this court at page 476 said:

“The opportunity to be heard is an essential requisite of due process of law in judicial proceedings” (citing cases).

In Ohio Valley Water Company vs. Ben Avon Borough et al., 253 U. S. 287, this court held:

“An order of a commission fixing the maximum future rates chargeable by a water company violates due process of law if no fair opportunity is provided by the state law for submitting the question whether the rates are confiscatory to the determination of a judicial tribunal upon its own independent judgment as to both law and fact.”

At page 289 of the opinion, it was said:

“The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. (Citing cases.) In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment. (Citing cases.)”

In American Surety Company of New York vs. Shalenger, 183 Fed., 636 (C. C. Neb.), it was held:

“Act Nebraska, April 1, 1909, (Laws 1909, c. 27), which makes it the duty of certain state offices to fix maximum rates of premium to be charged by all surety companies doing business in the state, foreign or domestic, for furnishing bonds, contracts, recognizances, stipulations and undertakings, makes it a misdemeanor for any officer or agent of any com-

pany to charge a higher rate and requires the revocation of the authority of the offending party to do business in the state, is void as depriving such companies of their property without due process of law, in violation of the fourteenth constitutional amendment."

In *Chicago, Milwaukee and St. Paul Railway vs. Minnesota*, 134 U. S., 448, it was held that the Minnesota statute regulating the rates of charges for the transportation of property and which provided that the rates recommended and published shall be final and conclusive as to what are equal and reasonable charges, was unconstitutional in that it deprived the company of its property without due process of law and also deprived it of the equal protection of the laws.

The Minnesota statute in question provided in Section 9 (f) that the Railroad Commission created, might issue forms of notices and service thereof which shall conform as nearly as may be to those in use in the courts of the state and that any party may appear before the state commission and be heard in person or by attorney. While this court in reviewing the decision of the Supreme Court of Minnesota, adopted the construction given the Act by the State Supreme Court, which seemed to ignore Section 9 (f) of the Act, still to accept the limited construction given to the Act, which this court held to be unconstitutional, it appears that the construction given to that law, was more favorable and more in keeping with the statutory limitations, than the construction given by the courts below to Section 25 of the Act of Congress of August 10, 1917. And yet this court held that the Min-

nesota law was in conflict with the fourteenth amendment of the constitution of the United States. The case of Chicago, Milwaukee and St. Paul Railway Company vs. Minnesota was followed in Minneapolis Eastern Railway Company vs. Minnesota, 134 U. S., 467, and has been followed in innumerable cases in this court.

If the President of the United States had by virtue of the Act of Congress complained of, the right to fix prices of coal and coke, then we contend that under the Minnesota case decision, the Act of Congress giving him such authority is in conflict with the fifth amendment to the United States Constitution, in that it deprives defendant of its property, without due process of law.

In *Stone vs. Farmers' Loan & Trust Company*, which is known as the Railroad Commission case, 116 U. S., 307, at page 331, this court said:

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

In *Oklahoma Operating Company vs. Love*, 252 U. S. 331, there was before the court a statute of the State of Oklahoma, creating a State Commission with power to determine what businesses are deemed to be public ones

and monopolies, and to limit their charges. The law and the constitution of the state prohibited any of its courts from reviewing any action of the Commission within its authority, except by way of appeal to the State Supreme Court, and the Supreme Court had construed the constitution and applicable statutes as not permitting a direct appeal from the order fixing rates. The State Commission declared a laundry to be monopoly in its business public, and limiting its rates. No review was permitted direct by appeal, mandamus, prohibition or otherwise, in any court of the state, and the only recourse for securing a judicial test of the adequacy of the rates fixed was to disobey the order and to appeal to the State Supreme Court from further action of the Commission, when taken, imposing a penalty for contempt; a penalty as high as \$500 might be imposed, and a new one for each violation of the order; and each day's refusal was declared to be a separate offense.

This court held:

"Applying *Ex parte Young*, 209 U. S., 123, 147, and other cases, that the provisions relating to the enforcement of the rates by penalties were violative of the Fourteenth Amendment, without regard to the question of the insufficiency of the rates."

This court, speaking through Mr. Justice Brandeis, at page 335 of the opinion, said:

"The order of the Commission prohibited from charging, without its permission, rates higher than those prevailing in 1913, in effect prescribing maximum rates for the service. It was, therefore, a legislative order; and under the Fourteenth Amendment plaintiff was entitled to an opportunity for a review

in the courts of its contention that the rates were not compensatory." (Citing cases.)

In *Holter Hardware Company v. Boyle*, 263 Fed., 134 (D. C. Mont; appeal dismissed in 257 U. S., 666), Bourquin, D. J., in passing upon the constitutionality of a statute of Montana, which created a State Trade Commission, with power to regulate prices and profits, including those in ordinary mercantile business, reviews the authorities thoroughly and analyzes them carefully, both with reference to state statutes under the police power and federal statutes under the federal powers, and held that the Montana Act was unconstitutional and void as depriving persons affected, of their property without due process of law.

At page 135 of the opinion, the learned court says:

"Emergency, opinion, morality, changes wrought by time and circumstances, often justify exercise of powers that legislatures have; but they create no new powers. It is true that the Constitution is not a barrier to changes in state policy and law to suit new circumstances and conditions, not a barrier to new application of its principles; but it does oppose all changes that would avoid or supplant its principles with other, however, calculated to suit the needs of the hour and the temper of the times. Its generic terms open always to include newly created species."

In the case of *Adams vs. Tanner*, 244 U. S., 590, this court held that a state statute prohibiting the charge of a consideration for securing honest work for the unemployed was violative of the Fourteenth Amendment of the Constitution, notwithstanding the business itself was

subject to regulation under the police power of the state.

To protect the private property of an individual from confiscation or unreasonable remuneration, as well as liberty to contract, this court has upon a number of occasions held invalid acts of congress and of the state legislatures, which attempted to test out social legislation that was in popular demand and requested of the legislative bodies by writers, students and private citizens from many parts of the country, such as the Federal Child Labor Laws, the Minimum Wage for Women Law, the Future Trading Act, the Kansas Industrial Court Law in *Hammer v. Dagenhart*, 247 U. S., 251; *Bailey v. Drexel Furniture Co. (Child Labor Tax Case)*, 259 U. S., 20; *Adkins et al. vs. Children's Hospital*, 260 U. S., 43 Sup. Ct. Rep., 394; *Hill et al. vs. Wallace*, 259 U. S., 44; *Wolff Packing Co. vs. Court of Industrial Relations*, 261 U. S., —, 43 Sup. Ct. Rep., 630.

In the present case, the District Court in his opinion in which he overruled the demurrer to the indictment (R. 22), said:

"It is true that the Act afforded no opportunity for judicial review of the reasonableness of the prices fixed by the President, and this has been determined, under ordinary circumstances, with reference to railroad and other rates, to be want of due process of law. *Chicago, Milwaukee & St. Paul Railway vs. Minnesota*, 134 U. S., 418; *Minnesota Rate Cases*, 230 U. S., 352, 434; *Oklahoma Operating Co. vs. Love*, 252 U. S., 331; *Holter Hardware Co. vs. Boyle*, 263 Fed., 134."

But the judge stated:

“Public danger warrants the substitution of executive process for judicial process. *Moyer vs. Peabody*, 212 U. S., 78.”

The decision of the court in that case is no authority for sustaining the judgment here. It involved no question of the taking of property, but merely held that the declaration of the Governor of a State that a state of insurrection existed was conclusive, and that the Circuit Court had no jurisdiction to entertain a civil suit for damages against him by a person he had caused to be placed under arrest in time of disorder.

But emergency does not permit the substitution of any kind of process for “due process.” In the case of *Murray’s Lessee vs. Hoboken Land Company*, 18 How., 272, at page 276, this court said:

“The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process that might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process, ‘due process of law,’ by its mere will.”

Neither can this case be supported on authority of the so-called “emergency law” cases, such as *Wilson vs. New*, 243 U. S., 332; (*Adamson Law*); *Block vs. Hirsch*, 256 U. S., 135 (rent law); *Marcus Brown Holding Company vs. Feldman*, 256 U. S., 170 (rent law); *Levy Leas-*

ing Company vs. Siegel, 258 U. S., 242, 42 Sup. Ct. Rep., 289 (rent law).

In the foregoing so-called "emergency law" cases, just compensation or reasonable payment for the service was provided for by the laws themselves, and the only question with reference to the emergency was, whether Congress or the State Legislature was justified in such emergency to pass laws of such nature dealing with private property or contracts. Not one of these so-called "emergency laws" would have been upheld by this court, had not just compensation, to be determined in some manner or other ultimately by the courts, been provided for in the laws themselves.

In *Wilson vs. New*, supra, this court said:

"In an emergency arising from a nation-wide dispute over wages between railroad companies and their train operatives, in which a general strike, commercial paralysis and grave loss and suffering overhang the country because the disputants are unable to agree, Congress has power to prescribe a standard of minimum wages, **not confiscatory in its effects** but obligatory on both parties, to be in force for a reasonable time, in order that the calamity may be averted and that opportunity may be afforded the contending parties to agree upon and substitute a standard of their own." (Black type ours.)

In *Block vs. Hirsch*, supra, this court, speaking through Mr. Justice Holmes, at page 157 of the opinion, said:

"Machinery is provided to secure to the landlord a reasonable rent. Sec. 106."

Nor can this case be compared to, or justified under the authority of the Selective Draft Law cases, 245 U. S.

366; *Jones vs. Perkins*, 245 U. S. 390; *Cox vs. Wood*, 247 U. S. 3; which cases were supported under the authority of Congress to raise armies by reason of the war powers given to Congress by the Constitution.

The opinion of the District Court, approved by the Court of Appeals, in distinguishing between the right to have a judicial review or a hearing within the ordinary meaning of "due process of law" and the substitution of executive process for judicial process within the meaning of the case of *Moyer vs. Peabody Company*, *supra*, virtually means that the exigency of the late war in effect authorized the suspension of the limitations contained in the Fifth Amendment to the Constitution.

That the existence of a state of war does not suspend the constitutional limitations, had been decided by this court in *Ex parte Milligan*, 4 Wall. 2, and subsequently affirmed in *Hamilton vs. Kentucky Distilleries*, 251 U. S. 146; *United States vs. Cohen Grocery Company*, 255 U. S. 81. See also *United States vs. New River Collieries Company*, 260 U. S. (.....); 43 Sup. Ct. Rep. 565.

In this holding by the District Court and the Court of Appeals, we submit there was error. In the case of *United States vs. Cohen Grocery Company*, 255 U. S. 81, in which section 4 of the Lever Act was held unconstitutional, this court, speaking through Mr. Chief Justice White, at page 88 of the opinion said:

"We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably established that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments

as to questions such as we are here passing upon (citing cases.) It follows that, in testing the operation of the Constitution upon the subject here involved, the question of the existence or non-existence of a state of war becomes negligible, and we put it out of view."

Testing the present case by the rule laid down in the Cohen case, it is very evident that the opinion of the District Court and the Court of Appeals in this case is not sound. While Sec. 25 of the Lever Act differs from that of Sec. 4, which was held unconstitutional in the Cohen case, in that by virtue of Sec. 25 prices were fixed, whereas in the Cohen case no prices were fixed, and notwithstanding the fact that in the Cohen case, Sec. 4 was held unconstitutional because the question of what were reasonable prices were too indefinite, and did not sufficiently inform the defendant of the charge against him, nevertheless the principle laid down by this court in the Cohen case, that the existence or non-existence of a state of war, or, to use the words of the District Judge and the Court of Appeals, "public danger," becomes negligible, and should be put out of view, and the usual rules with reference to the limitations of the Constitution upon the power of Congress and the Chief Executive should be applied. If, as is admitted by the District Court and the Court of Appeals, under ordinary circumstances there is a want of due process of law so far as this petitioner is concerned, then by applying the rule laid down by this court in the Cohen case, petitioner has been deprived of its property without due process of law, notwithstanding this proceeding grew out of and was during the existence

of a state of war, and was based upon an Act of Congress passed during such war.

The validity of Sec. 25 of the Lever Act was involved, but its validity not passed on by this court in *Morrisdale Coal Co. vs. United States*, 259 U. S. 188 and *Pine Hill Coal Co. vs. United States*, 259 U. S. 191.

In passing upon the question of "just compensation" under Sec. 10 of the Lever Act, this court did not limit the price required to be paid for coal taken by the Government or Government agencies, to the price fixed by the President or the Fuel Administration, but allowed the reasonable market value thereof, thereby in effect ignoring the validity of the price-fixing methods of the President or the Fuel Administration.

As said by the court in the *United States vs. New River Collieries Company*, 260 U. S. —, 43 Sup. Ct. Rep. 565:

"The owner of coal taken by the Government, under the Lever Act, Sec. 10, was entitled to the full money equivalent of the property taken, and to be put in as good position pecuniarily as it would have occupied, if its property had not been taken.

The ascertainment of compensation for the property taken by the Government under Lever Act, Sec. 10, is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard."

See also the case of:

Vogelstein vs. United States, 260 U. S. —, 43 Sup. Ct. Rep. 564.

Seaboard Air Line Railway vs. United States, 260 U. S. —, 43 Sup. Ct. Rep. 354.

United States vs. Blake, 279 Fed. 71 (C. C. A. 6) and *Blake vs. United States*, 275 Fed. 861 (D. C.)

See also the case of *Pharr and Sons vs. Kenny*, 272 Fed. 37, (C. C. A. 5—writ of certiorari denied in 257 U. S. 648; 42 Sup. Ct. Rep. 57) which was a civil action between two parties on a contract for the sale and purchase of sugar, during the term of which the price was fixed by the United States Food Administration. That court in syl. 7, said:

“The United States Food Administration, could not under the Act of Congress (Comp. St. 1918, Secs. 3115^{le}; 3115^{kk}; 3115^{le}; 3115^{lm}) creating it, arbitrarily fix a price at which future sales of sugar should be made.”

Our principal objection to the statute on constitutional grounds, as applied to the facts in this case, is not so much that the President was without power to fix the broker's commission; but that Congress was without power to authorize him to do so without investigation and without notice to the defendant and opportunity to be heard, and to subject the defendant to criminal punishment without permitting it at some time or other to show that the commission fixed was non-compensatory. In other words, we insist that property cannot be taken for public or private use or services compelled for such use, without the right to have it determined somewhere and at some time, either in advance or afterwards, whether the compensation provided is adequate.

As was said by the Ohio Supreme Court in *Railroad Company vs. Keith*, 67 Oh. S. 279, in syl. 3, in which the validity of an assessment on real estate was involved:

“It is necessary to the validity of an assessment on real estate, other than general taxes, that some-

where along the line of proceedings, notice be given to the owner, and an opportunity afforded him to be heard in opposition or defense."

See also *Brieholz vs. Board of Supervisors*, 257 U. S. 118.

In connection with the danger of the encroachment by the legislative body upon individual liberty, we deem it not amiss to quote from Mr. Justice Bradley, speaking for this court in *Boyd vs. United States*, 116 U. S. 616, in which, at pages 635, he said:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be **obsta principiis**."

- (b) **The Act of Congress Violates Section 1 of Article 1; Section 1 of Article 2 and Section 1 of Article 3, of the Constitution of the United States, in That it Delegates Legislative and Judicial Powers to the President of the United States, to the United States Fuel Administrator Appointed by the President, and the Federal Trade Commission.**

The courts have uniformly held that rate fixing or price fixing is a legislative function. It has also been recognized that if the subject is one over which the state legislature or Congress has authority, it may regulate the use or even the charge for the use of private property.

This rule has been well established since the case of *Munn vs. Illinois*, 94 U. S. 113, in which an Illinois statute regulating the maximum charges for grain elevators was upheld.

In *Interstate Commerce Commission vs. Cincinnati, New Orleans and Texas Pacific Railway Company*, 167 U. S. 479, in which the court held that Congress had not conferred upon the Interstate Commerce Commission the legislative power of prescribing rates, either maximum or minimum or absolute, this court, at page 501 of the opinion, said:

“Article 2, Section 3 of the Constitution of the United States ordains that the President shall take care that the laws be faithfully executed. The Act to regulate commerce is one of those laws, but it will not be argued that the President, by implication, possesses the power to make rates for carriers engaged in interstate commerce.”

At page 505 of the opinion, the court said:

“We have, therefore, these considerations presented: First, the power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function.”

In *City of Knoxville vs. Knoxville Water Company*, 212 U. S. 1, it was said:

“Rate making is a legislative function, whether exercised by the legislature or by a subordinate or administrative body to which power has been delegated, such as a municipality.”

In the *Minnesota Rate Cases*, 230 U. S. 352, it was said:

“The rate making power is a legislative power and necessarily implies a range of legislative discretion.”

That rate fixing or price fixing is a legislative function cannot at this time, in the face of the numerous decisions, be contradicted.

In *Field vs. Clark*; *Boyd vs. United States*, and *Sternback vs. United States*, reported in 143 U. S. 649, it was held.

“Congress cannot, under the Constitution, delegate its legislative power to the President.”

At page 692 of the opinion, it was said:

“That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”

At page 693 of the opinion, the court quotes with approval, from the opinion of Judge Ranney of the Supreme

Court of Ohio, in the case of Cincinnati, Wilmington, etc., Railroad vs. Commissioners, 1 Oh. St. 88, as follows:

"The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what is shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; and to the latter no valid objection can be made."

In the same case the court said:

"Power of the general assembly to pass laws cannot be delegated by them to any other body, or to the people."

See also:

Buttfield vs. Stranahan, 192 U. S. 470.

United States vs. Grimaud, 220 U. S. 507.

Light vs. United States, 220 U. S. 523.

Applying the rules just stated as are deduced from the cases cited, to Section 25 of the Act of Congress of August 10, 1917, let us see what is the result. Clause 1 of Section 25 of the Act, which is in question before the court, provides as follows:

"That the President of the United States shall be and he is hereby authorized and empowered whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation of and to regulate the mode of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic and foreign."

This gives the President of the United States the authority to fix the prices of ordinary commodities such as coal and coke. Without going into the question as to whether it is within the power of Congress to regulate prices within the meaning of the case of *Munn vs. Illinois*, *supra*, we contend that the President has no such authority and cannot be given such authority by Congress, and the exercise of such a power by the President, whether of his own whim, or under color of law, as enacted by Congress, is clearly in violation of the United States Constitution in which the respective powers of the three departments of the government are enumerated, namely the executive, the legislative and the judicial.

In Clause 2 of Section 25 of the Lever Act, the President is authorized, "If, in his opinion, any such producer or dealer fails or neglects to conform to such prices or regulations or to conduct his business efficiently under the regulations and control of the President as aforesaid; or conducts it in a manner prejudicial to the public interests, to requisition and take over the plant, business and all the appurtenances thereof belonging to such producer or dealer."

In Clause 17 of Section 25, it is made an offense punishable by a fine and imprisonment for anyone, "with knowledge that the prices of coal and coke have been fixed, to ask demand or receive a higher price." The result of reading the penal section of the Act in connection with the authority granted the President, is that prices fixed by the President as a result of his exercising undelegated legislative powers are to have the effect of law, which,

if violated, will subject the violator to severe punishment of a fine of not more than \$5,000.00 or imprisonment for not more than two years.

That the President has exercised this undelegated power appears from the various rules and regulations promulgated by the President through the United States Fuel Administration. . In publication No. 2 of the United States Fuel Administration, published August 21, 1917, the President fixed the price of bituminous coal throughout various states in the union. (See appendix p. 80.) On August 23, 1917, in publication No. 3, the President fixed the price of anthracite coal and the commissions of jobbers for buying and selling bituminous coal. (See appendix p. 83.) Likewise for about a year the President issued proclamations and regulations, not only regulating the prices but also the production, distribution and consumption of coal and coke.

In publication No. 9, issued by the United States Fuel Administrator on October 6, 1917, it was provided in paragraphs 8 and 9, as follows:

"A jobber who had already contracted to buy coal at the time of the President's order fixing the price of such coal, and who was at that time already under contract to sell the same, may fill his contract to sell at the price named therein.

"A jobber, who at the time of the President's order fixing the price of the coal in question at the mine, had contracted to buy coal at or below the President's price, **and at that time had no contract to sell such coal, shall not sell the same at a price higher than the purchase price plus the proper jobber's commission** as determined by the President's regulation of August 23, 1917." (Black face type ours.) (See general orders, regulations and rulings of the United States Fuel Administrator p. —; appendix p. 84.)

It is manifest from the foregoing, that the President attempted to exercise judicial powers, by interpreting the meaning of the clause, "the maximum prices so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith, prior to the establishment and publication of maximum prices by the commission," as used in the Act of Congress complained of.

No clearer example of the exercise of undelegated powers by the chief executive can be found.

It is the sole duty of the courts to pass upon the question of the reasonableness of the rates or prices that may be fixed by the legislature or administrative bodies which have power to fix such rates or prices, such as the Interstate Commerce Commission.

In *Monongahela Navigation Company vs. United States*, 148 U. S., 312, at page 327, this court, speaking through Mr. Justice Brewer, said:

"By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."

In *Seaboard Air Line Railway Company vs. United States*, supra, this court said:

“Lever Act, August 10, 1917, Sec. 10 (Comp. St. 1918, Sec. 3115½-i) authorizing the President to requisition property needed for war purposes, and to pay a just compensation therefor, without specifying any allowance of interest, requires payment of just compensation guaranteed by the Constitution, the right to which cannot be taken away, **and the ascertainment of which is a judicial function.**” (Black face type ours.)

And the same rule was approved by this court in *United States vs. New River Collieries Company*, 260 U. S., 43 Sup. Ct. Rep., 565, at 567, in which this court, speaking through Mr. Justice Butler, said:

“The ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation is to be, or to prescribe any binding rule in that regard.”

- (c) **The Act of Congress Violates Clause 1 of Section 8 of Article 1, and Clause 2 of Section 8 of Article 1, of the Constitution of the United States, in that, it is an Abuse of the Power Given to Congress to Provide for the National Security and Defense.**

Congress has, under the constitution, express delegated war powers” (Art. 1, Sec. 8, Cl. 11, U. S. Constitution).

While it is conceded that the war powers of Congress must not be necessarily restricted, yet even these powers, broad as they are, must be subjected to proper constitutional limitations. Similarly the exercise of the police

power, by the state, or through Congress, must be subjected to constitutional limitations. As was said by this court in *Hamilton vs. Kentucky Distilleries*, *supra*:

“The war powers of the United States, like its other powers, and like the police power of the states, is subject to applicable constitutional limitations.”

The emergency does not enlarge the powers of Congress, but merely justifies the exercise of powers which Congress has, but which are latent.

In *Ex parte Milligan*, *supra*, this court said:

“Neither the President nor Congress, nor the judiciary can disturb any one of the safeguards of civil liberty incorporated into the constitution, except so far as the right is given to suspend in certain cases the privileges of the writ of habeas corpus.”

In his dissenting opinion in the case of *Ruppert vs. Caffey*, 251 U. S., 261, Mr. Justice McReynolds, quite appropriately said:

“For sixty years, *Ex Parte Milligan*, 4 Wall., 2, 120, has been regarded as a splendid exemplification of the protection which this court must extend in time of war to rights guaranteed by the Constitution, and also as decisive of its power to ascertain whether actual military necessity justifies interference with such rights.”

At probably no other time in the history of the American republic, have the American institutions been put to a greater test than during the recent war. At no time in the history of the republic, have the courts been more anxiously called upon, to protect the individual from

the deprivation of his civil rights and liberties, guaranteed by the Constitution, and the courts should not hesitate to protect the individual from the arbitrary powers of the chief executive, or the legislative branch of the government, exerted during the then impending conflict, involving as it did, the very existence of the government itself.

As was said by the court in *Norris vs. Doniphan*, 61 Ky., 385, at page 396:

“The constitution was designed to be perpetual, and neither the President nor the Congress has the power to suspend it in war any more than in peace.”

At page 401, the court further said:

“The constitution does not recognize military necessity nor any other necessity whatever, as an authority for taking private property for public uses in peace or in war, without just compensation.”

There is sufficient precedent for the court to declare an act of Congress passed under its war power unconstitutional, when such a law exceeds its constitutional limitations.

In *ex parte Field*, Federal Case No. 4761, the Circuit Court of the United States for the district of Vermont held two orders of the war department issued by direction of President Lincoln, under his proclamation of August 8, 1862, to be invalid as in violation of Section 9 of Article 1 and of Articles 4 and 5 of the amendments to the Constitution.

In *Hodgson vs. Millward*, 3 Grant's Cases (Pa.), 405, it was held:

"The act of Congress of August 6, 1861, requiring the President, in certain cases, 'to cause certain property to be seized, confiscated and condemned,' does not authorize it to be done except by due process of law."

See also *Griffin vs. Wilcox*, 21 Ind., 370.

An emergency does not justify the violation of the plain provisions of the Constitution.

In *United States vs. Lombardo*, 241 U. S., 74, it was held:

"The proper and reasonable construction of a criminal statute must not be refused for fear of delay in prosecution of offenders; if the statute as so construed might embarrass prosecutions, it may be corrected by legislation."

Assuming for the sake of argument that there is some reasonable or substantial connection between the regulation of the production of coal and coke to the conducting of the war or to the promotion of the national defense, in that coal and coke are commodities that are essential to the carrying on of the war, still it can hardly be argued that the power to regulate the production of coal begets the power to regulate the prices thereof. The price fixing of coal and coke is entirely independent of the production. As was said by the court in the case of *Wilson vs. New*, supra, in construing the Adamson Eight Hour Law:

"The power to establish an eight-hour day does not beget the power to fix wages."

- (d) **The Act of Congress Violates the Tenth Amendment to the Constitution of the United States in that it Interferes with the Rights of the Respective States, as to Regulation of Industries Within the States.**

The Tenth Amendment to the Constitution of the United States provides:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

If no power vested in Congress to regulate the prices of coal and coke, then as a matter of course the only body that could, under any guise, exercise such power, would be the state legislature in the exercise of the police power of the state.

In the case of *Hammer vs. Dagenhart*, 247 U. S., 251, this court held the Federal Child Labor Law unconstitutional as not being within the powers of Congress nor within its authority to regulate interstate commerce. No one would, for a minute, question the salutary policy of correcting the evil of child labor. Social justice demands it and while it is very evident that certain states of the Union would not enforce local laws prohibiting child labor and that in the absence of a federal law on the subject there would be no means of correcting the evil, yet this court held that it was beyond the powers of Congress to enact such a law.

The child labor law had a much more reasonable and substantial relation to the regulation of interstate commerce than the Lever Act had with the carrying on of the war and the promotion of the national defense; and likewise the child labor law was a matter of greater economic necessity than the Lever Act, yet the child labor law was held unconstitutional, as being a power reserved to the states.

As was said in the Hammer case:

“The power to regulate interstate commerce was not intended as a means of enabling Congress to equalize the economic conditions in the states for the prevention of unfair competition among them, by forbidding the interstate transportation of goods made under conditions which Congress deems productive of unfairness.

It was not intended as an authority of Congress to control the states in the exercise of their police power over local trade and manufacture, always existing and expressly reserved to them by the tenth amendment.”

See also:

Bailey v. Drexel Furniture Co. (Child Labor Tax Law), 259 U. S., 20, and
Hill et al. vs. Wallace (Future Trading Act), 253 U. S., 44.

How much more can it be said of the Lever Act that the conducting of the war and the promotion of the national defense was not intended as an opportunity to test economic and political theories.

CONCLUSION.

We respectfully submit that the judgments of the courts below should be reversed and the case remanded with instructions to dismiss the indictment, or in the alternative that a new trial be granted.

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APPENDIX.

Act of Congress of August 10, 1917, commonly known as National Defense (Lever) Act (40 Stat. 276).

Section 1.—Food and Fuel Control Act.

An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement, of foods, feeds, fuel, including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for the actual production of foods, feeds, and fuel, hereafter in this act called necessities; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessities during the war. For such purposes the instrumentalities, means, methods, powers, authorities, duties, obligations, and prohibitions hereinafter set forth are created, established, conferred, and

prescribed. The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this act.

Sec. 2. That in carrying out the purposes of this act the President is authorized to enter into any voluntary arrangements or agreements, to create and use any agency or agencies, to accept the services of any person without compensation, to cooperate with any agency or person, to utilize any department or agency of the Government and to coordinate their activities so as to avoid any preventable loss or duplication of effort or funds.

* * * * *

Sec. 4. That it is hereby made unlawful for any person willfully to destroy any necessities for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessities in or in connection with their production, manufacture, or distribution; to hoard, as defined in section six of this Act, any necessities; to monopolize or attempt to monopolize, either locally or generally, any necessities; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessities; to conspire, combine, agree, or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessities; (b) to restrict the supply of any necessities; (c) to restrict distribution of any necessities; (d) to prevent,

limit, or lessen the manufacture or production of any necessities in order to enhance the price thereof, or (e) to exact excessive prices for any necessities; or to aid or abet the doing of any act made unlawful by this section.

• • • • •

Sec. 6. That any person who willfully hoards any necessities shall upon conviction thereof be fined not exceeding \$5,000 or be imprisoned for not more than two years, or both. Necessaries shall be deemed to be hoarded within the meaning of this Act when either (a) held, contracted for, or arranged for by any person in a quantity in excess of his reasonable requirements for use or consumption by himself and dependents for a reasonable time; (b) held, contracted for, or arranged for by any manufacturer, wholesaler, retailer, or other dealer in a quantity in excess of the reasonable requirements of his business for use or sale by him for a reasonable time, or reasonably required to furnish necessities produced in surplus quantities seasonally throughout the period of scant or no production; or (c) withhold, whether by possession or under any contract or arrangement, from the market by any person for the purpose of unreasonably increasing or diminishing the price: Provided, That this section shall not include or relate to transactions on any exchange, board of trade, or similar institution or place of business as described in section thirteen of this act that may be permitted by the President under the authority conferred upon him by said section thirteen: Provided, however, That any accumulating or withholding by any farmer or gardener, cooperative association or

farmers or gardeners, including live-stock farmers, or any other person, of the products of any farm, garden, or other land owned, leased, or cultivated by him shall not be deemed to be hoarding within the meaning of this Act.

* * * * *

Sec. 10. That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum as will make up such amount as will be just compensation for such necessities or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies: Provided, That nothing in this section or in the section that follows, shall be construed to require any natural person to furnish to the Government any necessities held by him and reasonably required for consumption or use by himself and dependents, nor shall any person, firm, corporation, or association be required to furnish to the Government any seed necessary for the seeding of land owned, leased, or cultivated by them.

Sec. 25. (1) That the President of the United States shall be, and he is hereby, authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign; said authority and power may be exercised by him in each case through the agency of the Federal Trade Commission during the war or for such part of said time as in his judgment may be necessary.

(2) That if, in the opinion of the President, any such producer or dealer fails or neglects to conform to such prices or regulations, or to conduct his business efficiently under the regulations and control of the President as aforesaid, or conducts it in a manner prejudicial to the public interest, then the President is hereby authorized and empowered in every such case to requisition and take over the plant, business, and all appurtenances thereof belonging to such producer or dealer as a going concern, and to operate or cause the same to be operated in such manner and through such agency as he may direct during the period of the war or for such part of said time as in his judgment may be necessary.

(3) That any producer or dealer whose plant, business, and appurtenances shall have been requisitioned or taken over by the President shall be paid a just compensation for the use thereof during the period that the same may

be requisitioned or taken over as aforesaid, which compensation the President shall fix or cause to be fixed by the Federal Trade Commission.

(4) That if the prices so fixed, or if, in the case of the taking over or requisitioning of the mines or business of any such producer or dealer the compensation therefor as determined by the provisions of this act be not satisfactory to the person or persons entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation in the manner provided by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

(5) While operating or causing to be operated any such plants or business, the President is authorized to prescribe such regulations as he may deem essential for the employment, control, and compensation of the employees necessary to conduct the same.

(6) Or if the President of the United States shall be of the opinion that he can thereby better provide for the common defense, and whenever, in his judgment, it shall be necessary for the efficient prosecution of the war, then he is hereby authorized and empowered to require any or all producers of coal and coke, either in any special area or in any special coal fields, or in the entire United States, to sell their products only to the United States through an agency to be designated by the President, such agency to regulate the resale of such coal and

coke, and the prices thereof, and to establish rules for the regulation of and to regulate the methods of production, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign, and to make payment of the purchase price thereof to the producers thereof, or to the person or persons legally entitled to said payment.

(7) That within fifteen days after notice from the agency so designated to any producer of coal and coke that his, or its, output is to be so purchased by the United States as hereinbefore described, such producer shall cease shipments of said product upon his own account and shall transmit to such agency all orders received and unfilled or partially unfilled, showing the exact extent to which shipments have been made thereon, and thereafter all shipments shall be made only on authority of the agency designated by the President, and thereafter no such producer shall sell any of said products except to the United States through such agency, and the said agency alone is hereby authorized and empowered to purchase during the continuance of the requirement the output of such producers.

(8) That the prices to be paid for such products so purchased shall be based upon a fair and just profit over and above the cost of production, including proper maintenance and depletion charges, the reasonableness of such profits and costs of production to be determined by the Federal Trade Commission, and if the prices fixed by the said commission of any such product purchased by the United States as hereinbefore described be unsatis-

factory to the person or persons entitled to the same, such person or persons shall be paid seventy-five per centum of the amount so determined, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation in the manner provided by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

(9) All such products so sold to the United States shall be sold by the United States at such uniform prices, quality considered, as may be practicable and as may be determined by said agency to be just and fair.

(10) Any moneys received by the United States for the sale of any such coal and coke may, in the discretion of the President, be used as a revolving fund for further carrying out of the purposes of this section. Any moneys not so used shall be covered into the treasury as miscellaneous receipts.

(11) That when directed by the President, the Federal Trade Commission is hereby required to proceed to make full inquiry, giving such notice as it may deem practicable, into the cost of producing under reasonably efficient management at the various places of production the following commodities, to wit, coal and coke.

(12) The books, correspondence, records, and papers in any way referring to transactions of any kind relating to the mining, production, sale, or distribution of all mine operators or other persons whose coal and coke have or may become subject to this section, and the books, correspondence, records, and papers of any person applying

for the purchase of coal and coke from the United States shall at all times be subject to inspection by the said agency, and such persons or persons shall promptly furnish said agency any data or information relating to the business of such person or persons which said agency may call for, and said agency is hereby authorized to procure the information in reference to the business of such coal-mine operators and producers of coke and customers therefor in the manner provided for in sections six and nine of the act of Congress approved September twenty-sixth, nineteen hundred and fourteen, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and said agency is hereby authorized and empowered to exercise all the powers granted to the Federal Trade Commission by said act for the carrying out of the purposes of this section.

(13) Having completed its inquiry respecting any commodity in any locality, it shall, if the President has decided to fix the prices at which any such commodity shall be sold by producers and dealers generally, fix and publish maximum prices for both producers of and dealers in any such commodity, which maximum prices shall be observed by all producers and dealers until further action thereon is taken by the commission.

(14) In fixing maximum prices for producers the commission shall allow the cost of production, including the expense of operation, maintenance, depreciation, and depletion, and shall add thereto a just and reasonable profit.

(15) In fixing such prices for dealers, the commission

shall allow the cost to the dealer and shall add thereto a just and reasonable sum for his profit in the transaction.

(16) The maximum prices so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith, prior to the establishment and publication of maximum prices by the commission.

(17) Whoever shall, with knowledge that the prices of any such commodity have been fixed as herein provided, ask, demand, or receive a higher price, or whoever shall, with knowledge that the regulations have been prescribed as herein provided, violate or refuse to conform to any of the same, shall, upon conviction, be punished by fine of not more than \$5,000, or by imprisonment for not more than two years, or both. Each independent transaction shall constitute a separate offense.

(18) Nothing in this section shall be construed as restricting or modifying in any manner the right the Government of the United States may have in its own behalf or in behalf of any other Government at war with Germany to purchase, requisition, or take over any such commodities for the equipment, maintenance, or support of armed forces at any price or upon any terms that may be agreed upon or otherwise lawfully determined.

**Orders and Regulations of the President and the United
States Fuel Administration Relating to the
Price of Coal.**

President's Order of August 21, 1917.

**Executive Order of the President of August 21, 1917,
Effective Evening of August 21, 1917, Fixing Pro-
visional Prices for Bituminous Coal at the Mine,
Issued as Publication No. 2 of the United States
Fuel Administration.**

The White House,
Washington, 21 August, 1917.

The following scale of prices is prescribed for bituminous coal at the mine in the several coal-producing districts. It is provisional only. It is subject to reconsideration when the whole method of administering the fuel supplies of the country, shall have been satisfactorily organized and put into operation. Subsequent measures will have as their object a fair and equitable control of the distribution of the supply and of the prices not only at the mines but also in the hands of the middlemen and the retailers.

The prices provisionally fixed here are fixed by my authority under the provisions of the recent act of Congress regarding administration of the food supply of the country which also conferred upon the Executive control of the fuel supply. They are based upon the actual cost of production and are deemed to be not only fair and just but liberal as well. Under them the industry should nowhere lack stimulation.

Woodrow Wilson.

| | Run of mine | Prepared sizes | Slack or screenings |
|---------------------------------------|----------------|-------------------|------------------------|
| Pennsylvania | \$2.00 | \$2.25 | \$1.75 |
| Maryland | 2.00 | 2.25 | 1.75 |
| West Virginia | 2.00 | 2.25 | 1.75 |
| West Virginia (New River) | 2.15 | 2.40 | 1.90 |
| Virginia | 2.00 | 2.25 | 1.75 |
| Ohio (thick vein) | 2.00 | 2.25 | 1.75 |
| Ohio (thin vein) | 2.35 | 2.60 | 2.10 |
| Kentucky | 1.95 | 2.20 | 1.70 |
| Kentucky (Jellico) | 2.40 | 2.65 | 2.15 |
| Alabama (big seam) | 1.90 | 2.15 | 1.65 |
| Alabama (Pratt, Jaeger, Corona) | 2.15 | 2.40 | 1.90 |
| Alabama (Cahaba & Black Creek) | 2.40 | 2.65 | 2.15 |
| Tennessee (eastern) | 2.30 | 2.55 | 2.05 |
| Tennessee (Jellico) | 2.40 | 2.65 | 2.15 |
| Indiana | 1.95 | 2.20 | 1.70 |
| Illinois | 1.95 | 2.20 | 1.70 |
| Illinois (third vein) | 2.40 | 2.65 | 2.15 |
| Arkansas | 2.65 | 2.90 | 2.40 |
| Iowa | 2.70 | 2.95 | 2.45 |
| Kansas | 2.55 | 2.80 | 2.30 |
| Missouri | 2.70 | 2.95 | 2.45 |
| Oklahoma | 3.05 | 3.30 | 2.80 |
| Texas | 2.65 | 2.90 | 2.40 |
| Colorado | 2.45 | 2.70 | 2.20 |
| Montana | 2.70 | 2.95 | 2.45 |
| New Mexico | 2.40 | 2.65 | 2.15 |
| Wyoming | 2.50 | 2.75 | 2.25 |
| Utah | 2.60 | 2.85 | 2.35 |
| Washington | 3.25 | 3.50 | 3.00 |

Note. Prices are on f. o. b. mine basis for ton of 2000 lbs.

Appointment of U. S. Fuel Administrator, Aug. 23, 1917.

**Executive Order of the President of the United States,
Dated August 23, 1917, Issued as Publication No. 1
of the United States Fuel Administration, Ap-
pointing H. A. Garfield, United States Fuel Admin-
istrator.**

By virtue of the power conferred upon me under the act of Congress approved August 10, 1917, entitled "An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," and particularly for the purpose of carrying into effect the provisions of said act relating to fuel, Harry A. Garfield is hereby designated and appointed United States Fuel Administrator to hold office during the pleasure of the President.

Said Fuel Administrator shall supervise, direct, and carry into effect the provisions of said act and the powers and authority therein given to the President so far as the same apply to fuel as set forth in said act, and to any and all practices, procedure, and regulations authorized under the provisions of said act applicable to fuel, including the issuance, regulation, and revocation under the name of said United States Fuel Administrator of licenses under said act. In this behalf he shall do and perform such acts and things as may be authorized and required of him from time to time by direction of the President and under such rules and regulations as may be prescribed.

Said Fuel Administrator shall also have the authority to employ such assistants and subordinates, including such counsel as may from time to time be deemed by him necessary, and to fix the compensation of such assistants, subordinates, and counsel.

All departments and established agencies of the Government are hereby directed to cooperate with the United States Fuel Administrator in the performance of his duties as hereinbefore set forth.

Woodrow Wilson.

The White House, 23 August, 1917.

Orders Relating to Jobbers, August 23, 1917.

Executive Order of the President of the United States of August 23, 1917, Issued as Paragraphs 1, 2 and 3, of Publication No. 3, of the United States Fuel Administration, Establishing Jobbers' Margins.

The following regulations shall apply to the intra-state, interstate, and foreign commerce of the United States, and the prices and margins referred to herein shall be in force pending further investigation or determination thereof by the President:

Jobber's Margins.

1. A coal jobber is defined as a person (or other agency) who purchases and resells coal to coal dealers or to consumers without physically handling it on, over, or through his own vehicle, dock, trestle, or yard.
2. For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin

in excess of 15 cents per ton of 2000 pounds, nor shall the combined gross margins of any number of jobbers who buy and sell a given shipment or shipments of bituminous coal exceed 15 cents per ton of 2000 pounds.

3. For buying and selling anthracite coal a jobber shall not add to his purchase price a gross margin in excess of 20 cents per ton of 2240 pounds when delivery of such coal is to be effected at or east of Buffalo. For buying or selling anthracite coal for delivery west of Buffalo a jobber shall not add to his purchase price a gross margin in excess of 30 cents per ton of 2240 lbs. The combined gross margins of any number of jobbers who buy and sell a given shipment or shipments of anthracite coal for delivery at or east of Buffalo shall not exceed 20 cents per ton of 2240 pounds, nor shall such combined margins exceed 30 cents per ton of 2240 pounds for the delivery of anthracite coal west of Buffalo. Provided that a jobber's gross margin realized on a given shipment or shipments of anthracite coal may be increased by not more than 5 cents per ton of 2240 pounds when the jobber incurs the expense of rescreening it at Atlantic or lake ports for transshipment by water.

• • • • •

Woodrow Wilson.

The White House, August 23, 1917.

Order of October 6, 1917.

Washington, D. C., October 6, 1917.

The following orders, rulings, and regulations relating to coal prices and governing the sale, shipment, and distribution of coal are promulgated by the United States

Fuel Administrator on behalf of the President under the authority of the act of Congress approved August 10, 1917, entitled "An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," and an Executive order of the President dated August 23, 1917, appointing said Fuel Administrator.

* * * * *

2. Contracts relating to bituminous coal made before the President's proclamation of August 21, 1917, and contracts relating to anthracite coal made before the President's proclamation of August 23, 1917, shall not be affected by these proclamations, provided the contracts are bona fide in character and enforceable at law, in the absence of further express regulation.

3. If the claim is made that any specific coal has been acquired in accordance with a bona fide contract enforceable at law existing prior to the time of the order of the President applicable thereto, the burden of proof is upon the parties to the contract to establish these facts.

4. Coal may be bought and sold at prices lower than those prescribed by the orders of the President.

5. The effect of the President's orders on coal rolling when the order affecting such coal was issued is to be decided by first ascertaining whether or not the title had passed from the operator to the consignee at the time the President's order became effective. If the title had passed to the consignee, the price fixed by the President does not apply.

* * * * *

8. A jobber who had already contracted to buy coal at the time of the President's order fixing the price of such coal, and who was at that time already under contract to sell the same, may fill his contracts to sell at the price named therein.

9. A jobber who, at the time of the President's order fixing the price of the coal in question at the mine, had contracted to buy coal at or below the President's price, and at that time had no contract to sell such coal, shall not sell the same at a price higher than the purchase price plus the proper jobber's commission as determined by the President's regulation of August 23, 1917.

10. A jobber who, at the time of the President's order fixing the price of the coal in question, was under contract to deliver such coal at a price higher than a price represented by the price fixed by the President or the Fuel Administrator for such coal plus a proper jobber's commission as determined by the President's regulation of August 23, 1917, shall not fill such contract at a price in excess of the President's price plus the proper jobber's commission, with coal purchased after the President's order became effective and not contracted for prior thereto.

11. A jobber who, at the date of the President's order fixing the price of the coal in question, held a contract for the purchase of coal without having already sold such coal, shall not sell such coal at more than the price fixed by the President or the Fuel Administrator for the sale of such coal after the date of such order, plus the jobber's commission as fixed by the President's regulation of August 23, 1917.

• • • • •

20. An assignment of a contract for the sale of coal, where such assignment is made after the President's order applicable to the price of the coal covered by the contract shall be treated as a sale of coal and be subject to all the orders and regulations of the President of the United States and the Fuel Administrator relating thereto.

* * * * *

H. A. Garfield,

United States Fuel Administrator.

Order of September 6, 1917.

Order of the United States Fuel Administrator of Sept. 6, 1917, Issued as Paragraph 7 of Publication No. 5 of the United States Fuel Administration, Permitting the Filling, at the Contract Price of Contracts Bona Fide in Character and Enforceable at Law, Entered into Prior to the Executive Orders of August 21, 1917, and August 23, 1917, for the Sale of Bituminous and Anthracite Coal, Respectively.

September 6, 1917.

* * * * *

7. Contracts relating to bituminous coal made before the proclamation of the President on August 21, and contracts relating to anthracite coal made before the President's proclamation of August 23, are not affected by these proclamations, provided the contracts are bona fide in character and are enforceable at law.

The undersigned has requested the Federal Trade Commission to secure at the earliest moment possible a certified copy of all contracts held to come within the foregoing rule.

H. A. Garfield,
United States Fuel Administrator.

Order of September 7, 1917.

Statement of United States Fuel Administrator, Dated September 7, 1917, Issued as Publication No. 6 of the United States Fuel Administration, in Regard to Mode of Organization of Local Fuel Administrations.

Washington, D. C., September 7, 1917.

The Fuel Administration realizes the acute need of making immediate arrangements to apportion the coal supply and regulate the retail sale of coal. To this end the following plan has been adopted:

The Fuel Administrator is immediately to choose a representative of the Fuel Administration in each State and Territory. He will also appoint in each State, in conjunction with the State representative, a committee of citizens, who, with the representative, will assume direction of the regulation of the sale of coal in that State. No person will be appointed, either as a State representative, or on any of these committees, or any of the committees mentioned below, who is connected with the local coal industry.

Each State representative as soon as appointed will choose a committee of citizens to represent the Fuel

Administration in each county of the State and in each city in the State having more than 2500 population, or such other population as the State Fuel Administrator may determine.

The State representative and the State committee will be chosen directly by the Fuel Administrator with the approval of the President.

The county committees and the city committees will be chosen directly by the State representative.

The State committee will at once ascertain the amount of coal in the State available for use during the coming winter and the amount of coal needed to meet any deficiency in the supply, based on last year's consumption.

It will be the duty of the various committees to ascertain and report to the Fuel Administration the reasonable retail margin (viz., the cost of local distribution and a reasonable dealers' profit to be allowed). This margin, when duly fixed by order, together with the cost at the mine named by the President, the transportation charge, and the jobber's commission, when sold through a jobber, will constitute the price to the consumer. The Fuel Administration will make public from its local committees in each community sufficient data to enable the individual consumer to ascertain for himself the established price.

These figures will be compiled with relation to local needs in order that the Fuel Administration may, if necessary, apportion the supply of coal with careful regard to the greatest existing needs. There are many com-

munities today in which there is no supply of coal available at retail prices.

A very large proportion of the coal supply available for the coming winter is under contract. These contracts, which are allowed to stand for the present, were made prior to the President's proclamation and very largely limit the amount which may be placed on sale at retail prices based on the President's order.

It is absolutely essential, however, that a sufficient amount of coal be put on the market at once at these prices to meet the needs of domestic consumers. The Fuel Administration believes that this supply of coal can be made available and will be made available by voluntary arrangement between the operators and those with whom they have contracts, and thus make it unnecessary for the Fuel Administration to exercise or recommend the exercise of the powers provided in the Lever Act.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923

No. 85

BENJAMIN N. FORD, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI FILED JULY 22, 1922.

CERTIORARI AND RETURN FILED NOVEMBER 9, 1922.

(29,045)

(29,045)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 495.

BENJAMIN N. FORD, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT.

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1 The District Court of the United States, Southern
District of Ohio, Western Division.

No. 1680.

INDICTMENT FOR —

Act of August 10, 1917, especially sections 1, 2, 3, 4 and 25 thereof, and the Executive Order of the President of the United States, dated August 23, 1917. A true bill. G. V. Thompson, Foreman Grand Jury. Filed November 7, 1919.

SOUTHERN DISTRICT OF OHIO,
Western Division, ss:

Of the October Term, in the Year Nineteen Hundred and Nineteen.

First Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

The grand jurors for the United States of America, empaneled and sworn in the District Court of the United States for the Western Division of the Southern Judicial District of Ohio, at the October Term thereof, in the year nineteen hundred and nineteen, and inquiring for that division and district, upon their oaths present:

That by reason of the existence of a state of war, it was essential to the national security and defense, for the successful prosecution of the war, and for the support of the army and navy, to secure an adequate supply and distribution, and to facilitate the movement of certain things the said Act called "necessaries," which said things so denominated in said act as "necessaries" included fuel; and to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting the supply, distribution and movement of such "necessaries," including fuel; and to establish and maintain governmental control of such "necessaries," including fuel, during the war, the Congress of the United States (by an Act approved August 10, 1917, commonly known as "The National Defense Act" and especially Sections 1, 2, 3, 4 and 25 thereof authorized the President to make such regulations and to issue such orders as were essential to carry out the provisions of said act and whenever in his judgment the same was necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic and foreign, excepting that the regulations and prices so fixed and published should not be construed as invalidating any contract in which prices were fixed, made in good faith, prior

to the establishment and publication of such prices and regulation. That pursuant to the provisions of the Act above referred to and under its authority, the President of the United States on August 23, 1917, issued an Executive Order establishing and regulating the prices and margins of coal jobbers to apply to the intrastate, interstate and foreign commerce of the United States in which said Executive Order it was provided, among other things, that

"1. A coal jobber is defined as a person (or other agency) who purchases and resells coal to coal dealers or to consumers without physically handling it on, over, or through his own vehicle, dock, trestle or yard.

"2. For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of 15 cents per ton of 2,000 pounds, nor shall the combined gross margins of any number of jobbers who buy and sell a given shipment or shipments of bituminous coal exceed 15 cents per ton of 2,000 pounds."

That during the months of September, October and November, 1917, The Matthew Addy Company, was, and still is, a corporation organized and existing under the laws of the State of Ohio, and was, in the City of Cincinnati, County of Hamilton and State of Ohio and within the jurisdiction of this Honorable Court, engaged in and conducting business as a coal jobber as defined in said Executive Order; and that Benjamin N. Ford, late of the said City of Cincinnati, County of Hamilton and State of Ohio, during all of said times, was and still is, the Vice-president of said The Matthew Addy Company, and in such official capacity had charge, control, supervision and direction of the activities, negotiations and contracts of said company insofar as they related to the conduct of its business as a coal jobber; that continuously during the said months of September, October and November, 1917, a state of war existed between the United States Government and the Imperial German Government and its allies, and the law, orders and regulations above referred to were in full force and effect.

The said grand jurors further present that on or about the tenth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-president, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Frey Brothers, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to-wit, about 50.30 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c) Cents per ton and which said profit or margin of Twenty-five (25c) Cents per ton was,

and was well known by said Benjamin N. Ford, Vice President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Frey Brothers, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice President of said The Matthew Addy Company, as aforesaid;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

4 Second Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

An the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count herēof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said grand jurors further present that on or about the eleventh day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Frey Brothers, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to-wit, about 42.35 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Frey Brothers, made in good faith prior to said 23rd day of August, 1917, in which said contract, the

price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Abby Company, as aforesaid; Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Third Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said grand jurors further present that on or about the eleventh day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Frey Brothers, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to-wit, about 51.25 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Frey Brothers, made in good faith prior to said 23rd day of August, 1917, in which said contract the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Addy Company, as aforesaid;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Fourth Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said grand jurors further present that on or about the eleventh day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Frey Brothers, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to-wit, about 50 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O.

B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Frey Brothers, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Addy Company, as aforesaid;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Fifth Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and

being thus fully incorporated herein by this reference as if fully written herein.

The said grand jurors further present that on or about the seventh day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from The Wagner Manufacturing Company, a corporation doing business in Sidney, Shelby County, Ohio, for a certain quantity of bituminous coal, to-wit, about 56.5 tons of 2,000 pounds each of Pocahontas run of mine coal, at a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said The Wagner Manufacturing Company, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Addy Company, as aforesaid;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Sixth Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

9 The said grand jurors further present that on or about the seventh day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as aforesaid, of said The Matthew Addy Company, doing

business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from The Wagner Manufacturing Company, a corporation doing business in Sidney, Shelby County, Ohio, for a certain quantity of bituminous coal, to-wit, about 45.6 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said The Wagner Manufacturing Company, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Addy Company, as aforesaid.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Seventh Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the
10 facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said grand jurors further present that on or about the twenty-sixth day of August, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, willfully, unlawfully, knowingly and feloniously did ask, demand and receive from Rice & Laub, doing business in Batavia, Clermont County, Ohio, for a certain quantity of bituminous coal, to-wit, about 46.85 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal,

which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Rice and Laub, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Addy Company, as aforesaid.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

11 Eighth Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated hereby by this reference as-if fully written herein.

The said grand jurors further present that on or about the eighth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Rice & Laub, doing business in Batavia, Clermont County, Ohio, for a certain quantity of bituminous coal, to-wit, about 49.70 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber;

and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Rice and Laub, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Addy Company, as aforesaid;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Ninth Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said grand jurors further present that on or about the twelfth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from the Connersville Lumber Company, doing business in Connersville, Fayette County, Indiana, for a certain quantity of bituminous coal, to-wit, about 57.15 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Connersville Lumber Company, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Addy Company, as aforesaid;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Tenth Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated hereby by this reference as if fully written herein.

The said grand jurors further present that on or about the thirteenth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from the Consumers Coal and Supply Company, doing business in Elkhart, Elkhart County, Indiana, for a certain quantity of bituminous coal, to-wit, about 49.6 tons of

2,000 pounds each of Pocahontas run of mine coal, a price
 14 of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Consumers Coal and Supply Company, made in good faith prior to said 23rd day of August, 1917, in which said contract the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Addy Company, as aforesaid;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Eleventh Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts,

conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated hereby by this reference as if fully written herein.

The said grand jurors further present that on or about the thirteenth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as
15 aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from the Consumers Coal and Supply Company, doing business in Elkhart, Elkhart County, Indiana, for a certain quantity of bituminous coal, to-wit, about 51 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Consumers Coal and Supply Company, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Addy Company, as aforesaid:

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Twelfth Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third
page hereof, the same being hereby made a part of this count
16 and being thus fully incorporated hereby by this reference as if fully written herein.

The said grand jurors further present that on or about the eleventh day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from the Whetstone Coal Company, doing business in Cincinnati, Hamilton County, Ohio, for a certain quantity of bituminous coal, to-wit, about 42.7 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty (\$3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty (\$3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Whetstone Coal Company, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Addy Company, as aforesaid.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. Stuart R. Bolin, United States Attorney, S. D. O.

MOTION TO QUASH INDICTMENT.

[Filed December 26, 1919.]

Comes now defendant, Benjamin N. Ford, by his attorney, and moves the court to quash the indictment and each and every one of the several counts contained therein, because of the following defects apparent upon the face of the record.

1. Said indictment and each of its several counts is insufficient in law and fact.

2. Said indictment and each of its several counts charges in each count several separate and distinct alleged offenses and is bad for duplicity.

3. Said indictment and each of its several counts charges no indictable offense under the laws of the United States.

4. That the averments in said indictment as to the form of same and the manner in which said offense is charged, are so vague, indefinite, uncertain, argumentative and misleading that the defendant is not properly informed of the charge against him or what he shall meet at the trial and can not prepare his defense.

5. That the indictment is not in the form of nor does it conform to the Act of Congress alleged to have been violated.

6. Other defects apparent upon the record. Nelson B. Cramer, Attorney for Defendant, Benjamin N. Ford.

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OPINION ON MOTION.

[Filed February 26, 1920.]

PECK, District Judge:

On motion to quash the indictment.

Identical questions are presented in each case.

The indictment is not multifarious. The offense is charged by the allegations of fact, not by the references to laws. The latter are surplusage.

The indictment is sufficient. The word "may" in the last clause of the first paragraph of Section 25 of the National Defense (Lever) Act (40 Stat., 276) is permissive. The President is thereby empowered, not required, to exercise his authority to regulate the prices and production of coal through the Federal Trade Commission in each instance. This is the ordinary significance of the word. *United States vs. Lexington Mill Co.*, 232 U. S., 399. And that it was so intended is clear from the context. It may be noted that the third paragraph vests in the President a similar optional discretion to act through the Commission or otherwise.

The authority of the Commission under the thirteen paragraph of the section is to fix local prices only after direction by the President to make the investigation authorized by the eleventh paragraph. The grant of powers to the Commission is contingent and does not become effective until that direction is given. Such grant does not, therefore, require the construction of the first paragraph, to the effect that the President can act only through the Commission, for which the defendant contends. *United States vs. Pennsylvania Central Coal Co.*, 256 Fed., 703.

For the Government: Stuart R. Bolin, United States Attorney; Allen C. Roudebush, Assistant United States Attorney. For the Defendants: Nelson B. Cramer, Julius R. Samuels.

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ORDER OVERRULING DEFENDANT'S MOTION.

[Filed June 4, 1920.]

This cause coming on to be heard upon defendant's motion to quash the indictment was argued by counsel and submitted to the court, upon consideration whereof the court found that said motion was not well taken and overruled the same on February 26, 1920, to which defendant excepts. And it is ordered that this entry be made as of February 26, 1920. Peck, J.

DEMURRER TO INDICTMENT.

[Filed February 28, 1920.]

Comes now defendant, Benjamin N. Ford, by his attorney and demurs to the indictment and each of its several counts contained therein for the following reasons, to-wit:

1. That the Act of Congress and the rules, regulations, promulgations and publications of the President and the United States Fuel Administrator, are indefinite, uncertain, and misleading and do not clearly describe an offense.

2. The Act of Congress and the rulings, regulations, etc., are unconstitutional for the following reasons, to-wit:

a. They violate the fifth amendment to the Constitution of the United States, in that defendant is deprived of its property without due process of law.

20 *b.* They violate the sixth amendment to the Constitution of the United States, in that defendant is not informed of the nature of the accusation.

c. They violate the tenth amendment to the Constitution of the United States in that they interfere with the rights of the respective states, as to regulation of industries within those states.

d. The Act of Congress of August 10, 1917, violates Section 1 of Article 1, Section 1 of Article 2, and Section 1 of Article 3 of the Constitution of the United States in that it delegates legislative and judicial powers to the President of the United States, to the United States Fuel Administrator appointed by the President, and the Federal Trade Commission.

e. The Act of Congress violates clause 1 of Section 8 of Article 1, and clause 11 of Section 8, of Article 1 of the Constitution of the United States in that, it is an abuse of the power given to Congress to provide for the national security and defense.

f. The ruling of the President of the United States under date of October 6th, 1917, violates clause 3 of Section 9 of Article 1 of the Constitution of the United States in that it is an *ex post facto* law. Nelson B. Cramer, Attorney for Defendant, Benjamin N. Ford.

OPINION ON DEMURRER.

[Filed May 29, 1920.]

PECK, *District Judge*:

On demurrer to indictment,

21 The principal question raised is whether Section 25 of the National Defense (Lever) Act, authorizing the President to fix the price of coal during the continuance of the war is constitutional as depriving of property without due process of law.

While the war created no new powers in Congress it undoubtedly required the exercise of powers latent in times of peace. *McKinley vs. U. S.*, 249 U. S., 397. The right to regulate business, including

the fixing of prices for essential commodities, in furtherance of a constitutional power of the United States, exists when the business sought to be regulated is one in which the public has an interest beyond that of the persons who participate in the individual transactions therein. *Munn vs. Illinois*, 94 U. S., 133. Businesses which are purely private in times of peace may become matters of vital public concern in times of war. The late war was a marshaling not only of the man-power of the nations engaged, but of their total resources and economic strength. The production and distribution of coal, the chief source of industrial energy, was a business in which the public had a vital interest over and above that of the individuals engaged in the particular transactions; therefore, it was a business which Congress had the right to regulate.

It is true that the Act afforded no opportunity for judicial review of the reasonableness of the prices fixed by the President, and this has been determined, under ordinary circumstances, with reference to railroad and other rates, to be want of due process of law. *Chicago, Milwaukee & St. Paul Ry. vs. Minnesota*, 134 U. S., 418; *Minnesota Rate Cases*, 230 U. S., 352-434; *Oklahoma Operating Co. vs. Love*, — U. S., —, decided March 22, 1920; *Tolter Hardware Co. vs. Boyle*, 263 Fed., 134.

But due process of law is not to be tested by form of procedure merely (*Cooley, Const. Lim. 7th Ed., p. 503*) and varies with the subject-matter and necessities of the situation. Public danger warrants the substitution of executive process for judicial process. *Moyer vs. Peabody*, 212 U. S., 78. During the war, when the marshaling of the industrial powers of the nation was imperative, prompt action was demanded and extended investigations such as are necessary to judicial review of the economic orders essential to the prosecution of the war were impractical and impossible. And, under the circumstances then existing, the fixing of prices in public industries necessary for the prosecution of the war, by the President under the

authority of the Act of Congress, was not the deprivation of due process of law; nor was the reposing of such power in the President unconstitutional as a delegation of either legislative or judicial power. *U. S. vs. Penn. Central Coal Co.*, 256 Fed., 703. Demurrer overruled.

For the Government: James R. Clark, Allen C. Roudebush; for Defendants: Nelson B. Grames, Julius R. Samuels.

ORDER OVERRULING DEFENDANTS' DEMURRER TO THE INDICTMENT.

[Filed June 4, 1920.]

This cause coming on to be heard upon the demurrer of defendant was argued by counsel and submitted to the court, upon consideration whereof the court found that said demurrer is not well taken and overruled the same on May 29, 1920, to which defendant excepted. And it is ordered that this entry be made as of May 29, 1920. Peck, J.

MOTION FOR A NEW TRIAL.

[Filed June 5, 1920.]

Defendant moves the court to set aside the verdict and discharge defendant, or grant a new trial, upon the following grounds:

1. The verdict against him on each count of the indictment on which he has been found guilty, to-wit, counts 1, 5, 7, 8, 9, 10 and 12, is not sustained by sufficient evidence and is contrary to law and the evidence.

2. The court erred in refusing to give to the jury each of the charges requested by the defendant and refused.

3. The court erred in its general charge to the jury.

4. The court erred in excluding evidence offered by the defendant.

5. The court erred in admitting evidence on behalf of the Government over objection of the defendant.

6. The court erred in overruling defendant's motion at the close of the Government's evidence to dismiss the cause and discharge defendant.

7. The court erred in overruling defendant's motion at the close of all the evidence to dismiss the cause and discharge defendant.

8. Other errors of law occurring at the trial, and excepted to by defendants. Nelson B. Cramer, Joseph S. Kraydon, Julius R. Samuels, Attorneys for Defendant.

RULING ON MOTION FOR NEW TRIAL.

[Filed June 23, 1920.]

PECK, District Judge:

On motion for new trial.

It is urged that the court gave retroactive effect to the President's order of August 23, 1917, fixing the jobber's commission, in that, whereas the order prescribes that for the buying and selling of bituminous coal a jobber shall not add more than fifteen cents to his purchase price, the defendant was convicted for having, after the promulgation of that order, added a margin in excess of that prescribed with respect to coal which it had contracted for prior to the date of the order. The argument presented is that the defendant had a vested interest in its contract of purchase, and that the regulation is not to be so construed as to effect the same unless such clearly appears to be the intention. But does it not clearly so appear?

The preamble of the Lever Act declares that by reason of a state of war, it is essential for the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement, and to prevent scarcity, manipulation and hoarding of coal, and injurious speculation, manipulation and private controls affecting such supply, distribution and

movement, and to establish and maintain, during the war, control of coal, among other necessities therein enumerated. The objects to be accomplished were of immediate urgency. It was not a permanent policy that was being instituted, but prompt and extraordinary action for the national defense. To effect the same the President was given authority, by Section 25, to fix the price of coal wherever and whenever sold.

The act took effect upon August 10, 1917, and eleven days later the President promulgated a general scale of prices at the mines, for bituminous coal, and almost immediately thereafter, August 23, issued a further proclamation fixing the prices for anthracite coal, and, as a part thereof, promulgated the regulation in question relating to jobbers' margins. The order stated that the margins therein referred to should be in force pending further investigation.

25 It is well known, and if it were not so it is recognized in certain orders of the Fuel Administration (see order November 8, 1917, General Orders, p. 448), that the coal mine output was largely contracted to be sold in advance. Coal not under contract was spoken of as "free coal." (Order of October 6, 1917, Id., 445.) By the 25th section of the act existing contracts for future delivery were saved. The supply of coal was, therefore, to a large extent, contracted for by jobbers, and in their hands, so to speak, at the time the act was passed. Unless jobbers' margins with reference to then existing contracts were regulated, it remained open to the jobber to demand what he could get for his coal, and to thus carry on the injurious speculation, manipulation and private control of the supply which the act was designed to prevent. Reading together the Act of Congress and the presidential orders designed to carry out the purpose thereof, it does not seem open to doubt that it was the intention of the President to control and prevent speculation in the commodity so far as possible, not merely to fix prices for mine operators and permit those jobbers who held contracts for the mine output to be free from all restriction in the disposition of the same.

As to the vested interest of the jobber in his contract, it was not greater than that of the mine-owner in his coal, mine and equipment. The construction of the order contended for would discriminate as against the mine-owner and in favor of the jobber. It would be, in short, to say that the President had regulated the mine operator's price but left the jobber without limit as to price or profit on coal held by contract. Such a construction would violate the obvious purpose of the act.

Should the indictment have averred that the margin charged was for the buying and selling of the coal? The indictment alleges that the defendant, in its capacity as a coal jobber (viz., one who bought and sold), asked, demanded and received a price f. o. b. the mines producing said coal (which, of itself, would preclude the possibility of the defendant's having paid transportation charges), a price per ton which included a profit or gross margin to it, as such coal jobber (in other words, a "jobber's commission"—see orders of October 6, 1917), of twenty-five cents per ton, which profit or margin was, and was well

known to the defendant to be, in excess of that permitted by regulation, which regulation defining a jobber's margin is
 26 forth in the indictment. The phrase "profit or gross margin" to it as a coal jobber" may be fairly assumed to be synonymous with "jobber's commission" as used in the subsequent order of the Fuel Administration, and by the regulation would be defined as that sum allowable to a jobber for the buying and selling of coal.

It would, therefore, seem that the indictment charges a violation of the regulation (which violation is, by the 25th section of the Fuel Act, made an offense), in words which would render it certain, the truth being found, that the defendant is guilty, and which inform the defendant definitely of the accusation to be met; and, judgment having been rendered thereon would suffice to protect the defendant against another indictment for the same acts. More is not required.

Motion overruled.

For the Government: Allen C. Roudebush, Assistant United States Attorney; for the Defendants: Nelson B. Cramer, Julius R. Samuel, Joseph S. Graydon.

ENTRY OVERRULING MOTION FOR NEW TRIAL.

[Filed June 23, 1920.]

This case coming on to be heard upon a motion of the defendant for new trial, and the court being fully advised in the premises, finds that said motion is not well taken.

Therefore, it is hereby ordered, adjudged and decreed, That
 27 said motion be overruled, to all of which said defendant excepts. Peck, Judge United States District Court, S. D.

MOTION IN ARREST OF JUDGMENT.

[Filed June 23, 1920.]

The defendant, Benjamin N. Ford, moves the court to arrest judgment as to each of the counts of the indictment upon which he has been found guilty, to-wit, counts 1, 5, 7, 8, 9, 10 and 12, upon the following grounds:

1. The matters and things set forth and charged do not constitute an offense against the laws of the United States.

2. The provisions of the Act of Congress of August 10, 1917, Stat., 276, known as the National Defense (Lever) Act, and especially Sections 1, 2, 3, 4 and 25 thereof, and the promulgation of the order of the President issued August 23, 1917, and especially Section 1 and 2 thereof, are, as construed and applied by the judgment of the court, unconstitutional and void, in that they attempt to create offenses and impose penalties repugnant to the Constitution of the United States, especially Section 1 of Article 1, Section 1 of Article 2 and Section 1 of Article 3; and to the provisions of the 5th amendment that no person shall be deprived of life, liberty or property.

without due process *fo* law; and to the provision of the 6th amendment that in all criminal cases the accused is entitled to be informed of the nature and cause of the accusation against him; and to the 10th amendment reserving to the States, or to the people thereof, powers not delegated to the United States; and to Clause 1 of Section 8 of Article 1, and Clause 11 of Section 8 of Article 1 of the Constitution of the United States.

3. The averments of each of said counts are too general, vague, uncertain and indefinite to state an offense, or to inform defendant of the nature and cause of the accusation or to apprise him, with such reasonable certainty of the offense with which he is charged, and which he may be expected to meet on a trial, as to enable him to make his defense.

4. Each of said counts undertakes to charge separate and distinct offenses, and is bad for duplicity.

5. Upon certain of said counts, conviction was had for acts committed outside the jurisdiction of the court. Nelson B. Cramer, Joseph S. Graydon, Julius R. Samuels, Attorneys for Defendant.

ENTRY OVERRULING MOTION IN ARREST OF JUDGMENT.

[Filed June 23, 1920.]

This case coming on to be heard upon a motion in arrest of judgment filed by the defendant, and the court being fully advised in the premises, finds said motion not to be well taken.

Therefore, it is hereby ordered, adjudged and decreed, That said motion be overruled, to all of which said defendant excepts. Peck, Judge United States District Court, S. D. O.

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VERDICT.

[Filed June 2, 1920.]

We, the Jury, herein do find the defendant, Benjamin N. Ford, guilty in manner and form as charged in the 1, 5, 7, 8, 9, 10, 12, counts of said indictment, and not guilty as charged in the remaining counts thereof. (Signed) J. C. Rodgers, Foreman.

SENTENCE.

[Entered June 24, 1920.]

This day came the District Attorney on behalf of the United States and the defendant Benjamin N. Ford being present in court.

Thereupon, the District Attorney moving for sentence the court pronounced the following sentence, to-wit: That the said defendant pay a fine of One Thousand (\$1,000.00) Dollars and the costs of this prosecution to be taxed and that he remain imprisoned in the jail of Hamilton County, Ohio, until said fine and costs are paid or until he is otherwise discharged by law.

It is further ordered by the court that the said sentence be stayed pending the allowance and disposition of a writ of error herein, upon the defendant giving a bond in the sum of Two Thousand, Five Hundred Dollars (\$2,500.00) with sureties to be approved by the Clerk of this court, conditioned for his appearance before this court from day to day as may be required pending the allowance and disposition of a writ of error herein and from day to day thereafter as the court may direct and not depart the court without the leave thereof.

Thereupon came the defendant and executed his bond in the sum of Two Thousand, Five Hundred (\$2,500.00) Dollars with James A. Green and Robert M. Green as sureties and was released from custody.

RECOGNIZANCE FOR APPEARANCE.

[Filed June 24, 1920.]

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

Be it remembered, That on this 24th day of June, A. D. 1920, before me, B. E. Dilley, Clerk of the United States District Court, within and for the district aforesaid, duly appointed as such by the said court, personally came, Benjamin N. Ford as principal and James A. Green and Robert M. Green, as sureties, and jointly and severally acknowledged themselves to owe the United States of America in the sum of Twenty-five Hundred (\$2,500) Dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to-wit:

The condition of this recognizance is such, that if the said Benjamin N. Ford shall personally appear before the District Court of the United States, in and for the District aforesaid, at Cincinnati, Ohio, from day to day as may be required pending the allowance and disposition of a writ of error in the case of the United States vs. Benjamin N. Ford, No. 1680, said defendant having been sentenced by the court in said case to pay a fine of \$1,000 and costs of prosecution and to stand committed until said fine and costs are paid, and then and there to abide said judgment and sentence in the event said judgment and sentence is sustained, and then and there abide the further order of said court, and not depart without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue. Benjamin N. Ford. James A. Green. Robert M. Green.

Taken and acknowledged before me on the day and year first above written. B. E. Dilley, Clerk U. S. District Court, Southern District of Ohio, by Harry F. Rabe, Deputy. (Seal.)

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, James A. Green, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities, I am worth Twenty-five Thousand (\$25,000) Dollars in real estate in my own name, situate in the County of Hamilton in said District. James A. Green.

Sworn to before me the 24th day of June, 1920. Harry F. Rabe,
Deputy Clerk U. S. District Court, S. D. O.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, Robert M. Green, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities, I am worth Twenty Thousand (\$20,000) Dollars in real estate in my own name, situate in the County of Hamilton in said District. Robert M. Green.

Sworn to before me the 24th day of June, 1920. Harry F. Rabe,
Deputy Clerk U. S. District Court, S. D. O.

31

BILL OF EXCEPTIONS.

Trial before Hon. John W. Peck and a jury, at Cincinnati, beginning June 1, 1920.

Appearances: Allen C. Roudebush, Assistant U. S. Attorney, for the Government; Nelson B. Cramer, Julius R. Samuels and Joseph S. Graydon for defendant.

Tuesday Afternoon, June 1, 1920.

Court met pursuant to adjournment, all counsel being present as noted.

The Court: Which one of these cases is to be tried first, Mr. District Attorney?

Mr. Roudebush: Matthew Addy case.

The Court: United States of America vs. The Matthew Addy Company. Is defendant ready?

Mr. Cramer: I understood the cases were to be tried together.

Mr. Roudebush: That is satisfactory.

The Court: That could only be done of course by agreement of counsel.

Mr. Roudebush: I agree to it, Your Honor.

Mr. Cramer: It is agreeable, yes.

The Court: That is, both cases may be tried upon the same evidence at the same time, simultaneously?

Mr. Cramer: In so far as the indictments apply against each one. There are twenty-three counts against the company and eleven against the individual.

The Court: Of course, separate verdicts will be rendered in each case, so they will be separate simultaneous trials.

Thereupon, after a jury had been duly impaneled and sworn, the trial proceeded as follows:

The Court: The Government may state its case.

Mr. Roudebush: If Your Honor please, and gentlemen of the jury, the Government expects the evidence to show that The Matthew Addy Company, a corporation doing business in this city, was a jobber and handled this coal in question as a jobber, without physically handling same; that The Matthew Addy Company, on or about, or, in fact, on the 31st day of July, 1917, made a contract with the Bluefield Coal & Coke Company, of Bluefield, West Virginia, in which they purchased coal at three dollars and twenty-five cents per ton at the mines; that this company, without physically handling this coal, sold this coal to different parties—
32 set forth in the twenty-three counts, part to each of twenty-three different persons. The defendants have offered and agreed that they would admit and stipulate that the coal was sold to these parties as set forth in the indictment, at the charge, which is all the same in each one, of three dollars and fifty cents a ton, and that they had no contract to sell to these twenty-three different parties—

Mr. Cramer: If the court please, we are admitting the naked sale of this coal at three dollars and twenty-five cents—three dollars and a half, not any other—

Mr. Roudebush: Mr. Cramer, I asked you just before the jury was sworn—

Mr. Cramer: If the court please, if there is any controversy I would ask that the jury be dismissed, and not have any controversy as to veracity between counsel in their presence.

The Court: Is it admitted that the coal set forth in the several counts of both indictments was sold at the prices and in the quantities and on the dates therein set forth?

Mr. Cramer: That is all we have admitted.

The Court: That is admitted?

Mr. Roudebush: That is what I stated.

The Court: That is the extent of the admission, as I understand it.

Mr. Roudebush: And that the Matthew Addy Company is a corporation?

Mr. Cramer: Certainly.

Mr. Roudebush: Your Honor, do they admit that the coal was sold on the dates that we set forth in the indictments to the parties and at the price?

The Court: That is the admission in each case, in each of the several counts. I am correct, am I not, Mr. Cramer?

Mr. Cramer: Yes, sir.

Mr. Roudebush: Gentlemen of the jury, the evidence will show, as I started to say, that this coal was purchased on the 31st day of July, of the Bluefield Coal & Coke Company of Bluefield, West Virginia, for three dollars and twenty-five cents a ton; that it was sold to the different parties set forth at three dollars and a half a ton, being a commission of fifty cents a ton—

Mr. Cramer: Twenty-five cents.

Mr. Roudebush: Twenty-five cents a ton.

A Juror: What do you mean?

33 Mr. Roudebush: A profit of twenty-five cents a ton, that they charged a commission of twenty-five cents a ton when the regulation said they could only charge fifteen cents.

Mr. Graydon: Now, if Your Honor please, that is not a correct statement of any regulation that could be introduced in evidence. I don't know how to meet the effort of the Government to state what everybody knows they can't prove. If that statement is to stand before the jury I would like the District Attorney—

The Court: What is the statement you object to?

Mr. Graydon: He says he has some regulation which says they could not charge a commission of more than twenty-five cents.

Mr. Roudebush: Gross margin.

Mr. Graydon: No such regulation can be produced. The regulation which is relied on is set forth in the indictment.

The Court: It is set forth in the indictment.

Mr. Graydon: Then why state it?

The Court: The defendants may state the defense.

Mr. Graydon: If Your Honor please, I would like Your Honor to require the Government to state the offense which is proposed to be proven, with the possibility that if he fails to state any offense we won't have to state any defense.

The Court: Well, for the sake of exactness, will you please read that Presidential order to which you refer, Mr. Roudebush?

Mr. Roudebush: The part of it as set forth in the indictment I think covers the point.

(Reading:) "A coal jobber is defined as a person (or other agency) who purchases and resells coal to coal dealers or consumers without physically handling it on, over, or through his own vehicle, dock, trestle or yard.

"For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of 15 cents per ton of 2,000 pounds, nor shall the combined gross margin of any number of jobbers who buy and sell a given shipment or shipments of bituminous coal exceed 15 cents per ton of 2,000 pounds."

Mr. Graydon: Now, Your Honor, the District Attorney has stated what the regulation is, and I would now like to have him required to state what he proposes to prove as a violation of the regulation.

34 The Court: I believe he stated that the coal was purchased at \$3.25 a ton, and proposed to show it was sold at \$3.50 a ton, as I understand it, and that, coupled with the allegation that he makes that the defendants were then and there coal jobbers, is the

statement upon which the Government relies. Let the defense be stated.

Mr. Cramer: If the court please——

The Court: Mr. Cramer.

Mr. Cramer: and gentlemen of the jury, the defendants in this case have been indicted under what is known as the "profiteering" law, the Lever Act, passed by Congress August 10, 1917. The Government has just stated its case, that we have violated the President's promulgation or order of August 23, which states that the gross margin allowed in any single transaction shall be fifteen cents. The indictment doesn't agree with the Government's statement of what it expects to prove. The indictment states that Benjamin N. Ford—referring to Mr. Ford's indictment and not the corporation—acting in his capacity as vice-president, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully and knowingly and feloniously did ask and demand and receive from Frey Brothers, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to-wit, about 50.3 tons of 2,000 pounds each of Pocahontas Run-of-Mine coal, a price of \$3.50 per ton, f. o. b. the mines producing said coal, which said price of \$3.50 per ton included a profit or gross margin to it.

Now Mr. Roudebush has not accused, in his preliminary statement of the case, that we have made a profit.

Mr. Graydon: Yes, he did say that.

Mr. Cramer: I mean in reading the promulgation of the President. In his preliminary statement he said we are charged in this indictment with having made a gross profit—a profit, not gross or net or otherwise, of more than fifteen cents a ton—as such coal jobber as aforesaid, of twenty-five cents a ton—included a profit or gross margin, referring again to the exact phraseology of the indictment—that \$3.50 a ton included a profit or gross margin to it, the said The Matthew Addy Company, as such coal jobbers as aforesaid, of twenty-five cents per ton, and which said profit or margin of twenty-five cents per ton was, and was well-known to said Benjamin N. Ford, vice-president, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of profit of fifteen cents per ton of 2,000 pounds permitted by law, executive order or regulations above referred to.

The Lever Act is the profiteering law, and the State has stated they expect to prove we made a profit in excess of the fifteen cents allowed by the promulgation of August 23rd.

We expect to prove that this coal—and as has been stated by Mr. Roudebush in his opening statement—was purchased by a contract dated July 31, 1917, which was more than a month prior to the enactment of the Lever Act, which was enacted by Congress under date of August 10, 1917. That act specifically exempted from its control or influence any contract—it didn't say contract of purchase and contract of sale; it says "any contract." And I wish to refer to the act.

Mr. Roudebush: Your Honor, I object to this line of opening

statement, because it is a question of interpretation of the law, and I don't think it is proper because the interpretation of the law upon which this indictment is based is that it must be both sold—must be a contract for both sale and purchase. It seems to me we ought to know where we are on that, to start with.

The Court: Of course, the statement to the jury is a statement of the facts that you expect to prove. However, if counsel desire to call the court's attention to any matters of law to be considered they may do so.

Mr. Cramer: That is absolutely so. I am repeating, as I thought, what Mr. Roudebush had just referred to as proof for the admission that this coal was purchased under contract dated July 31, 1917.

The Court: I am inclined to think the consideration of the law should be——

Mr. Cramer: I will try and refrain from a consideration of the law.

The Court: Very well.

Mr. Cramer: We expect to prove that at the time of the purchase of this coal under date of July 31, 1917, there was a quasi-official agreement between the Government of the United States, as represented by Secretary of Interior Lane——

Mr. Roudebush: Your Honor, I object to this.

The Court: Well, counsel may state what he expects to prove. I can't pass on it all in advance.

36 Mr. Cramer: —and at that time, and under that agreement, which is known as the Lane-Peabody Agreement, the commission, the gross commission of jobbers of coal was fixed at twenty-five cents per ton; that the memorandum of the purchase of this coal under date of July 31, 1917, was by Mr. Ford, as manager of the department of coal sales and purchases, was sent to the different branch offices of The Matthew Addy Company, and to the different salesmen selling coal for The Matthew Addy Company, with a notation that under the Lane-Peabody Agreement we can add twenty-five cents a ton to the purchase price.

We expect to show that a part of the coal purchased from the Bluefield Coal & Coke Company was sold between the date of its purchase and August 23rd, at which time the President fixed the commission allowed to coal jobbers, and that after that time the balance of this coal was sold.

The third defense or point that we will prove is that the fifteen cents allowed by the President under his proclamation of August 23rd would not have equalled the selling price to the Matthew Addy Company——

Mr. Roudebush: I object.

Mr. Cramer: —the costs of the sales——

The Court: Counsel may state his defense. The questions of admissibility of evidence will be considered later, Mr. Roudebush.

Mr. Cramer: If the court please, I would like to answer the Government's argument on that.

The Court: You may proceed with your statement of the facts, Mr. Cramer.

Mr. Cramer: As I have stated, we expect to prove that the fifteen cents allowed under the President's promulgation of August 23, 1917, was not a sufficient amount to cover the actual cost of selling the coal purchased under date of July 31st, by which I mean that if the sale of this coal was controlled by the Lever Act and we had only added fifteen cents to the purchase price of that coal that there would have been an actual monetary loss sustained by The Matthew Addy Company.

That is sufficient.

The Court: The Government may call its evidence.

Mr. Cramer: Mr. Roudebush, do you want a stipulation?

Mr. Roudebush: Yes.

37 The Court: You might cover this matter of sales by a stipulation to start with.

(Thereupon counsel for the government confers with counsel for defendants.)

Mr. Graydon: If there is any misunderstanding about what it was I suppose the Government can produce its case, if counsel can't agree what their verbal understanding was.

The Court: Does the stipulation cover the place of sale?

Mr. Roudebush: I think so, Your Honor.

(Thereupon counsel for both sides again confer.)

Mr. Graydon: I don't think the Government will contend that any counsel on this side ever agreed to admit anything that was not alleged in the indictment. If I am mistaken about that I would like to be advised about it.

Thereupon the following stipulation was entered into between counsel for both sides:

It is hereby stipulated between counsel for the Government and the defendants that the coal in the several counts of each indictment was sold to the parties mentioned in each count, respectively, at the date and price and in the amount set forth in each count of said indictments, and that The Matthew Addy Company is a corporation organized under the laws of the State of Ohio.

The Court: Now, the stipulation does not cover the place of sale, do I understand?

Mr. Graydon: No.

The Court: Does the indictment show it was done in this district in each case?

Mr. Roudebush: Yes, Your Honor, in the City of Cincinnati, Hamilton County, State of Ohio, within the jurisdiction of this court.

Mr. Graydon: Well, I think there would be no evidence to sustain that allegation, if Your Honor please. We can't admit it.

Mr. Roudebush: No, there won't be any evidence, because that was the understanding.

Mr. Graydon: There was no understanding. The indictment itself shows it was shipped from the mine outside of the jurisdiction

of this court to a purchaser in Chicago, Illinois, outside of this jurisdiction; and the allegation is that Ford, within the jurisdiction, did wilfully, unlawfully, knowingly, and feloniously ask, demand and received a certain amount of money. Now, the facts, if developed, will show that the sale was made at the Chicago office, so we can't accede to any stipulation of that kind. I am just making that statement because I don't want it suggested that we are going back on any agreement with him.

Mr. Roudebush: Your Honor, under the circumstances I would like to have this case continued until we can get our witnesses here. Counsel for defendants—it was their proposition, and they asked us, said they wouldn't dispute the sales as charged in the indictment, and for that reason I did not subpoena any witnesses except one witness, as a mere form. Now they come in court and say they agree to admit the sales but they don't admit that the sales were made in this jurisdiction. Their office, their place of business is here, and it seems to me it is no more than fair that we have an opportunity to produce our witnesses and as we would have produced our witnesses had we not come to the proposition of admitting these things in order to save the Government money. That is the only reason why we did not go into that matter.

Mr. Graydon: There wasn't any agreement, Your Honor, made by any counsel on behalf of the defendants in this case, except as has been stated, that in order to save the time of the court and expedite the trial of this case that we would concede such and such amounts of coal were sold to the respective individuals named in the different counts; that the prices at which they were sold were as stated in those counts, respectively, and that the amounts were as stated in those counts. It is impossible, if Your Honor please, that counsel could have conceded that these sales were made in this jurisdiction, because by so doing they would have made a concession contrary to the facts in respect to many of the counts; in fact, as to some of them the sales were made here, but I am indicating that to your Honor to rebut any suggestion that we made any agreement in regard to that matter. We did not expect to be found guilty or defend against the counts in which the proof showed that the court had no jurisdiction in regard to the offense, if any.

Mr. Cramer: If we had agreed to it the court wouldn't have had jurisdiction.

Mr. Graydon: I was going to suggest, if Your Honor please, that in view of the fact there are certain counts in which the evidence would establish that the sales were made here, we have no objection to proceeding on one or more of those counts. We make no concession or admission in regard to any count in which the sale occurred or in which the money was demanded and received outside the jurisdiction of the court.

The Court: Will you specify those counts? Are you willing to specify those counts?

Mr. Graydon: I think that Mr. Cramer and Mr. Roudebush can pick them out.

The Court: Well, you might do that. We will take a few min-

utes recess, gentlemen of the jury, while the counsel are conferring about this matter.

After a short recess the jury were returned into the jury box and the trial proceeded as follows:

The Court: What is the situation, gentlemen?

Mr. Graydon: Well, defendant is ready to proceed with the trial, Your Honor.

Mr. Roudebush: Your Honor, I would like to ask a continuance to the latter part of this week.

The Court: You mean a postponement?

Mr. Roudebush: I mean a postponement.

The Court: You don't want any continuance to the latter part of the week.

Mr. Graydon: I would like to know upon what ground the postponement is requested.

The Court: What is the ground, Mr. Roudebush?

Mr. Roudebush: On the ground that I understood the agreement I had with Mr. Samuels was to the effect that they would admit the sales were made as alleged in the indictment, and now they have raised the point that the court has not jurisdiction, that the sales were not made here. The indictment alleges that the sales were made within the jurisdiction of this court.

Mr. Cramer: That only covers part of them.

Mr. Samuels: We admit that some of them were made here.

The Court: What?

Mr. Samuels: We admit that some of the sales were made here.

Mr. Cramer: And denying the fact that we did anything of that kind. If we had admitted it it could not bestow jurisdiction on this court, if the evidence showed that the transaction took place in Chicago.

40 The Court: No, but an admission would be evidence of the fact.

Mr. Samuels: No such admission was made, if Your Honor please.

Mr. Graydon: If Your Honor please, the indictments charge simply a purchase by The Matthew Addy Company of coal from the Bluefield Coal Company in West Virginia, without the jurisdiction of the court, and then that The Matthew Addy Company did feloniously ask, demand and receive a certain stated price for sales of parts of this coal to various named persons; and in each count it is set forth where those persons are located, and some of them are located within the vicinity of Cincinnati, and the fact is that those sales were made here, and the prices fixed, and the demand. And others for instance, one I have here, the Alexander Lumber Company, a corporation doing business in Chicago, Cook County, Illinois, and in respect to those the sales were made, as I understand it, at an office of the company in Chicago.

Now, Mr. Roudebush says he understood that counsel admitted certain facts. From what Mr. Samuels advises me, it is not a matter of understanding but a distinct statement that we would admit the names of the persons to whom the sales were made, including their

addresses, the price at which they were sold, and the amounts at which they were sold. Now, just before Your Honor vacated the bench we had undertaken to point out, with the assistance of Mr. Ford, who has the complete record here, the actual facts about these transactions. Suddenly Mr. Roudebush comes in and says, "I think I will demand a continuance." Now, for what purpose I don't know. It may be he doubts the accuracy of Mr. Ford's statements, but I submit to Your Honor the defendant is here now, ready to meet this indictment, and unless he is unwilling to take our statement in regard to that, that the Government has no ground for asking for a continuance or postponement of the case.

The Court: It will seriously disarrange the calendar of the court to postpone the trial. I assume that the stipulation is not fairly understood in the same way by counsel for both sides. If the admissions which are offered by the defendants are sufficient to justify the Government in proceeding, I would much rather proceed, but I don't think the Government should be pressed to a conclusion of the trial at this time if it has fallen into error through a
41 misunderstanding concerning a stipulation verbally made, perhaps not made as closely as it might have been.

Mr. Graydon: Well, if Your Honor please, I beg to suggest that in respect to those counts as to which the defendant admits the sales here, there certainly is no ground for not proceeding with the case. And, of course, the result of bringing in any evidence about these other counts will show that they were outside the jurisdiction of the court; there can't be any question of that.

The Court: How many counts.

Mr. Graydon: We have checked them over, Mr. Roudebush checked them, and we thought he was finished and satisfied.

Mr. Roudebush: Mr. Graydon, I didn't say anything about being satisfied. And about the statement Mr. Samuels made you are absolutely wrong. We did not go into details and make the statements that you say we made here.

Mr. Graydon: Did you make any agreement with Mr. Samuels specifically in respect to any of these sales, that they were made at a certain place?

Mr. Roudebush: Mr. Graydon, the truth of the matter is that I was going to have my witnesses subpoenaed, and Mr. Samuels came in here after the trial of another case and said "You needn't subpoena your witnesses; we will admit the sales as you allege them there." We did not go into details about it.

The Court: Now, let us see what we can do.

Mr. Graydon: All right.

The Court: Now, without regard to the past—

Mr. Graydon: Very well. I suppose I might assist Your Honor by going over the matter. The very first sale is the 10th of September to The Alexander Lumber Company, a corporation doing business in Chicago, Cook County, Illinois. Mr. Ford advises me that sale was made by a representative of the company at its office in Chicago to the Alexander Lumber Company of Chicago.

Mr. Roudebush: And approved here, wasn't it, Mr. Graydon—

a contract signed here in Cincinnati, approved—subject to your confirmation?

Mr. Graydon: There was an acknowledgment of it.

Mr. Roudebush: Subject to the approval of Mr. Ford, here in Cincinnati?

Mr. Graydon: If there is any peculiar provision in the particular contract I suppose they could prove that. If there was a reservation of right after the taking of the order and agreement on the price, and that is going to bring that transaction within the jurisdiction, that is a case the court can actually pass on. I am talking about the facts.

The Court: The fact for the court is—

Mr. Roudebush: Your Honor, there is also a question of the payment. They seem to not want to admit that the people paid for the coal as it was sold.

Mr. Samuels: That is not an admission, whether they received it. They merely asked—

The Court: The indictment alleges asked, demanded and received it.

Mr. Graydon: We concede that. Well, the first one was at Chicago.

The Court: How many of them are here? Are there enough counts here to satisfy the Government?

Mr. Graydon: I think so, yes. The second is at Chicago; the third is at Chicago; the fourth one is at Chicago; the fifth was a sale to Wagner Manufacturing Company, Shelbyville—Shelby, Ohio.

Mr. Cramer: Sidney, Shelby County.

Mr. Graydon: The sixth count in the Ford indictment?

Mr. Cramer: No, the company indictment—the same thing.

Mr. Graydon: The sixth count was Cincinnati; seventh count, South End Supply Company, Chicago, was made at Chicago; eighth count, South End Supply Company, Chicago, was at Chicago; ninth count, Batavia, Clermont County, Ohio, was made at Cincinnati; the tenth count, Batavia, Ohio, made at Cincinnati; eleventh count, Cincinnati, Ohio, made at Cincinnati; twelfth count, Connersville, Indiana, made at Cincinnati; thirteenth was at Cincinnati; fourteenth, Cincinnati; fifteenth, Cincinnati; sixteenth, Cincinnati; seventeenth, Cincinnati; eighteenth, Kraft & Company, Chicago, was made at Chicago; nineteenth, same, Chicago, Illinois; twentieth, Frey Brothers, Chicago, made at Chicago; twenty-first, Frey Brothers, Chicago; twenty-second, Frey Brothers, Chicago; twenty-third, Frey Brothers, Chicago. That is the company.

The Court: That is about half of them, isn't it?

Mr. Graydon: About half.

43 Mr. Samuels: More than half—twelve out of twenty-three.

Mr. Graydon: This is Ford's, the Ford indictment. The first count, Frey Brothers, Chicago—that was at Chicago; second count, Chicago; third count, Chicago; fourth count, Chicago; fifth count,

Cincinnati; sixth count, Cincinnati; seventh count, Cincinnati; eighth count, Cincinnati; ninth count, Cincinnati; tenth count, Cincinnati; eleventh count, Cincinnati; twelfth count, Cincinnati.

Mr. Samuels: Eight out of twelve.

Mr. Roudebush: Some of those were made out of Chicago.

Mr. Samuels: Eight out of twelve, out of Ford's.

The Court: I suppose defendant will be willing to stipulate with reference to those in which you say sales were made at Cincinnati, and that they were made at the place in the indictment alleged. Where you say the sales were made, I suppose that means did ask, demand and receive, as alleged in the indictment, the price therein alleged. And under those circumstances, is the Government ready to go ahead?

Mr. Roudebush: Do they admit the money was received here in Cincinnati?

Mr. Graydon: Yes, admit the venue of the offense as stated in the indictment.

The Court: What is there, then, in those indictments, that are matters of fact that are not admitted Mr. Graydon?

Mr. Graydon: Well, of course, it hasn't—the Government proposes to show the previous purchase. The matters of fact that are alleged in the stating part of the indictment is that there was a profit, or gross margin, realized upon it.

The Court: That is, you admit the purchase price and the sale price, but not—

Mr. Cramer: A profit.

The Court: That the difference constituted what is designated in the act as a gross margin?

Mr. Graydon: No, Your Honor.

Mr. Cramer: The indictment says profits.

Mr. Graydon: But we claim it did not constitute what is alleged in the indictment as having been a profit or gross margin.

44 The Court: Where the word "profit" in the indictment is mere surplusage, in order to convict it must be a gross margin.

Mr. Graydon: I would like Your Honor not to pass on the question whether that would be surplusage without hearing from us.

The Court: How could it be anything else?

Mr. Graydon: Briefly stated, an unnecessarily precise allegation of an essential fact must be proved as alleged—

The Court: No doubt of that.

Mr. Graydon: And especially in a case of this sort, Your Honor, where, if the Government is permitted to allege in an indictment, under an indictment aimed at profiteering, and that matter is in the air, and a jury is impaneled to try a case, if they can be permitted to allege, without proving, that a gross profit charged, a gross margin charged was a profit, to that extent it is highly prejudicial. Unless they propose to prove that—

The Court: The terms of the indictment are a profit or gross margin.

Mr. Graydon: That means "to-wit." Under the established authorities that is an alternative of two things, that is to say, a profit or, to-wit, a gross margin.

The Court: What difference is it from alleging a gross margin?

Mr. Graydon: They must prove it was a profit and a gross margin, that is to say, we were under no expense whatever in doing business.

Mr. Cramer: We are accused of profiteering.

The Court: We will come to that question later. That is a question of construction, rather than of fact.

Mr. Graydon: Yes, I think it is a question that arises on the face of the indictment, because I suppose the court could take notice that a jobber, as defined in the act, doesn't do business without some expense.

The Court: At any rate, that question will arise when we come to it. Then are you ready to proceed, Mr. Roudebush?

Mr. Roudebush: Your Honor, if we get this stipulation so there can't be any question about these things they have stated now, so there won't be another argument in ten minutes—

Mr. Graydon: We propose to argue our clients' cases at any appropriate time the question arises.

45 Thereupon the following stipulation was entered into between counsel:

It is stipulated between counsel that the transactions in the 5th, 6th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th and 17th counts of the indictment against The Matthew Addy Company were that the defendant, The Matthew Addy Company, acting in the capacity of a coal jobber, did ask, demand and receive from the parties in the said counts respectively set forth, for the quantities of bituminous coal in the said counts respectively set forth, a price of three dollars and fifty cents per ton f. o. b. at the mines producing said coal; that the said price of three dollars and fifty cents was twenty-five cents in excess of the price at which said The Matthew Addy Company had theretofore purchased said coal on July 31, 1917, per ton of 2,000 pounds, in the city of Cincinnati, Hamilton County, Ohio, at the times in the said counts respectively set forth.

The Court: Are the defendants willing to accept that?

Mr. Graydon: They are.

The Court: The Government can put on its proof as to the other counts.

Mr. Graydon: That is only in one indictment we have stipulated.

The Court: The other indictment, I suppose the stipulation would be the same.

Mr. Graydon: It will be the same, but we will have to specify the counts.

The Court: I suppose it would be that the defendant Mr. Ford, instead of the defendant The Matthew Addy Company—

Mr. Cramer: Substituting Mr. Ford's name and the number of the indictments.

The Court: The numbers of the counts. What are the numbers

of the counts in the other indictment. Have you got that, Mr. Roudebush, the numbers of the counts in the Ford indictment that they admitted?

Mr. Graydon: Before stipulating to that, if Your Honor please, we want to ask the Government to elect whether they will proceed against Mr. Ford or the company. It is not charged he did that individually.

Mr. Cramer: It is charged he did it as an officer of the company.

The Court: Why should there be any election?

46 Mr. Graydon: I don't want to stipulate that Mr. Ford did this transaction other than as alleged—that he did it as an officer of the company, that's all. You Honor suggested we stipulate that he——

The Court: I don't think there would be a right of election.

Mr. Graydon: I will make that motion and reserve an exception.

The Court: Overruled.

Mr. Cramer: Reserve an exception.

Mr. Graydon: Then in regard to the Ford indictment the counts at Cincinnati are the fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth.

Mr. Cramer: That is eight out of the twelve.

The Court: Very well. Are you ready to proceed now?

Mr. Roudebush: What will be the disposition of the other counts?

The Court: The Government will be put on its proof.

Mr. Roudebush: Can we have a postponement as to those other counts?

The Court: No, you can not have a postponement. The Government will be put on its proof on the other counts.

Mr. Roudebush: Will we have an opportunity to get our witnesses here for those?

The Court: If you can get them here tomorrow.

Mr. Roudebush: They are in Chicago.

The Court: You will have to get them here tomorrow morning. This was the time the case was set down to be tried.

Mr. Graydon: Let the stenographer note in respect to the Matthew Addy and Ford indictments that the defendants moved to elect as to which defendant it will proceed against, which motion was overruled, and the defendants excepted, and that that applies to each count in that indictment.

Thereupon the jury were returned into the jury box.

The Court: The jurors are all present. Do you want to offer that stipulation to start with?

Mr. Roudebush: We will call Mr. Easley.

The Court: Do you want to offer this stipulation?

Mr. Roudebush: Yes, sir.

Thereupon the stipulations in regard to both indictments were read to the jury.

47 Mr. Roudebush: It is also admitted the company is a corporation under the laws of——

Mr. Cramer: That was agreed in the other stipulation.

The Court: It is also agreed that the company is a corporation. Now, you have a witness to call?

Mr. Roudebush: Call Mr. Easley.

The witness FRANK S. EASLEY, sworn on behalf of the government testified he lived in Bluefield, W. Va., and did business there as president of the Bluefield Coal & Coke Company. That company had a contract with The Matthew Addy Company dated July 31, 1917, for the sale of forty car-loads of bituminous run-of-mine coal, signed on behalf of The Matthew Addy Company, by B. N. Ford, also another contract of same date. Said contracts offered in evidence as government exhibits No. 1, and No. 2.

The coal was shipped by the Bluefield Coal and Coke Company, on orders of The Matthew Addy Company as follows:

- 1 car, Oct. 10, 1917, to Consumers Coal and Supply Company, Elkhart, Ind.
- 1 car, Oct. 22, 1917, to Alexander Lumber Co.
- 1 car, Oct. 6, 1917, Fred Kluckhohn, Napersville, Ind.
- 1 car, Nov. 12, 1917, Fred Kluckhohn, same address.
- " Oct. 16, 1917, Wagner Mfg. Co., Sydney, Ohio.
- " Nov. 12, 1917, South End Supply Co., Chicago, Illinois.
- " Nov. 16, 1917, South End Supply Co., Chicago, Illinois.
- " Oct. 19, 1917, Rice & Laub, Batavia, Ohio.
- " Sept. 25, 1917, Rice & Laub, Batavia, Ohio.
- " Nov. 9, 1917, Boye & Emmes Machine Tool Co., Cincinnati, Ohio.
- " Oct. 18, 1917, Connellsville Lumber Co., Connellsville, Ind.
- " Oct. 10, 1917, Consumers Coal & Supply Co., Elkhart, Ind.
- " Sept. 25, 1917, Consumers Coal & Supply Co., Elkhart, Ind.
- " Oct. 13, 1917, Frank M. Dell, Indianapolis, Ind.
- " Oct. 26, 1917, Frank M. Dell, Indianapolis, Ind.
- " Oct. 20, 1917, D. G. McFadden, Ridgeville, Ind.
- " Oct. 24, 1917, Kraft & Co., Chicago, Ill.
- " Oct. 22, 1917, Kraft & Co., Chicago, Ill.
- " Oct. 8, 1917, Frey Bros., Chicago, Ill.
- 48 " Nov. 13, 1917, Frey Bros., Chicago, Ill.
- " Nov. 8, 1917, Frey Bros., Chicago, Ill.
- " Oct. 25, 1917, Frey Bros., Chicago, Ill.

These cars were all approximately fifty tons. Defendants objected to all the dates on the ground that they were immaterial and reserved exception to the overruling of the objection. All the shipments were requisitions upon the coal purchased by The Matthews-Addy Company from the Bluefield Company.

On cross-examination the witness testified that the contracts, Exhibits 1 and No. 2 were made on behalf of The Bluefield Coal & Coke Company, by S. S. Kofer, its general manager, duly authorized.

FRED C. REIF, a witness for the government, residence 267 McMillan street, Cincinnati, Ohio, office man in the Boye Emmes Machine Tool Company, Cincinnati, testified that that company bought one car-load of Pocahontas run-of-mine coal on an order of September 14, 1917 at \$3.50 a ton of 2,000 lbs., which was shipped to the purchaser at Cincinnati, by the Bluefield Coal & Coke Company, shipment being made from Honaker, Virginia. The order was given to The Matthew-Addy Company by telephone in Cincinnati and payment was made here. The witness produced and offered in evidence government Exhibit No. 3, being the bill for said car-load of coal, government Exhibit No. 4, being the check in payment therefor, and government Exhibit No. 5, being the bill of lading.

HENRY H. GRUNKEMEYER, 3717 Eastern Avenue, Cincinnati, manager of the Whetstone Coal Company, 64 Congress Avenue, Cincinnati, testified that he purchased a car of Pocahontas run-of-mine coal from the Matthew-Addy Company, September 11, 1917, at \$3.50 a ton, through defendant Ford. The order was given over the telephone in Cincinnati, and payment made here by check. The witness produced and the government offered in evidence Exhibits No. 6, No. 7 and No. 8, being the invoice, check and order on said shipment respectively. There was no contract for the purchase of this coal prior to September 7, 1917.

H. M. RICE, of Batavia, Clermont County, Ohio, doing business there as Rice & Laub Coal Company, testified that he made the purchases already stipulated, being two carloads as charged in the indictment; that the contract was made in the office of The Matthew-Addy Company in Cincinnati with Mr. B. N. Ford, sometime after
49 government had set the price on coal, and payment made here, also that there was no previous contract. The government offered in evidence government exhibits Nos. 9, 10, and 11, being freight bills, invoices and checks covering these two shipments.

IVAN M. McCLATCHIE, of Chicago, Illinois, buyer for Alexander Lumber Company, testified that he purchased coal for that company from The Matthew-Addy Company on or about September 10, 1917. The coal was Pocahontas run-of-mine and the contract was made with Mr. Zimmerman, Chicago representative of The Matthew-Addy Company in Chicago. The price was \$3.50 a ton, and there was no previous contract between The Matthew-Addy Company and the Alexander Lumber Company. Government Exhibits Nos. 12 and 13, being the original purchase order and invoice on this purchase order and invoice on this purchase were offered in evidence.

On cross-examination the witness testified to his signature to a letter of October 18th, to A. J. Devlin, Special Agent of the Department of Justice which was offered in evidence as defendant's Exhibit A.

F. W. CORNELIUS, of Indianapolis, Indiana, General Manager of Frank M. Dell, as a witness for the government testified to a purchase from the Matthew-Addy Company of a car of red ash run-of-mine coal at \$3.50 per ton; purchase having been made at Cincinnati, Ohio, without any previous contract. Government Exhibits 14, 15 and 16, being the invoice, the check and contract covering the foregoing transaction were offered in evidence.

D. G. MCFADDEN, doing business as D. G. McFadden Grain Company, of Ridgeville, Indiana, testified to a purchase of a carload of coal from The Matthew-Addy Company on or about September 24, 1917, at \$3.50 per ton at the mines, being Pocahontas run-of-mine. The check in payment thereof was mailed to The Matthew-Addy Company at Cincinnati. The contract signed by B. N. Ford, Vice President of The Matthew-Addy Company, was offered in evidence as government Exhibit No. 17.

WILLIAM KRAFT, 4350 North Leavitt street, Chicago, sworn as a witness for the government, testified to a purchase of coal from The Matthew-Addy Company, September 13, 1917, for \$3.50 per ton. He had no previous contract for the coal. Payment was made by check sent to Cincinnati. Witness produced, and government put in evidence the invoices being Exhibits Nos. 18 and 19.

50 On cross-examination the witness testified that the order was given and accepted, the price fixed at Chicago, Illinois.

GEORGE J. FREY, a witness for the government, residence 1914 Summerdale avenue, Chicago, doing business under the name of Frey Brothers, testified to a purchase of coal from The Matthew-Addy Company on or about September 10, 1917, consisting of four carloads at \$3.50 per ton, and produced the checks in payment therefor, the invoices and expense bills which were offered in evidence as government Exhibits Nos. 20 to 34 inclusive. The coal was Pocahontas run-of-mine, the price \$3.50 per ton at the mines, and there was no contract for the purchase previous to September 11, 1917. On cross-examination the witness testified that he obtained the price and accepted the offer on all four cars as a single transaction in the office of The Matthew-Addy Company in Chicago, Illinois, through Mr. Zimmerman.

FRED R. KLUCKHOHN, a retail coal dealer of Naperville, Illinois, testified to a purchase on September 7, 1917, from The Matthew-Addy Company, and produced an invoice covering two cars. He had no contract prior to September 7th insofar as he could recollect. He stated that he did his business through the Chicago office of The Matthew-Addy Company, but the invoice was stamped at Cincinnati. The two invoices and confirmation of the order were offered in evidence as government Exhibits Nos. 35, 36 and 37. On cross-examination the witness testified that the transaction occurred in Chicago, and that he had no dealings with the Cincinnati office. The two cars were a single transaction.

FRANK G. KOZLOWSKI, of West Pullman, Chicago, Illinois, called as a witness by the government testified that he was a coal dealer in West Pullman, carrying on business under the name of West Pullman Fuel Company; that he purchased coal from the Matthew-Addy Company on or about September 8, 1917, having no contract previous to that day; that he paid for the same by sending in check to the Chicago office of The Matthew-Addy Company, which check and the invoice were offered in evidence as government Exhibits Nos. 38 and 39.

ELMER FRED ERICKSON, Manager South End Supply Co., Kensington, Illinois, testified to a purchase of coal from The Matthew-Addy Company, September 13, 1917, without previous order at \$3.50 per ton. Payment was made by checks sent to Cincinnati, which checks are offered in evidence as government Exhibits Nos. 40 and 41. The sale was made and confirmed through the Chicago office of The Matthew-Addy Company.

J. M. HUMPHREY, 3560 Vista Avenue, Cincinnati, called as a witness for the government testified that in the fall of 1917 he was working for The Matthew-Addy Company in Cincinnati, of which B. N. Ford was general manager of the coal department, passing upon the purchases and sales. The witness was engaged in buying and selling and assisting in the office.

Witness stated that The Matthew-Addy Company was a jobber, that is to say, a person who purchases and resells coal to coal dealers or consumers without physically handling it on, over or through his own vehicle, trestle, dock or yard. The company had a branch office in Chicago, the main office being at Cincinnati. The witness testified that he offered for sale the coal covered by the indictment at \$3.50 per ton f. o. b. mines under instructions of B. N. Ford. The witness could not recall the persons to whom he offered the coal for sale, but being shown a list by the United States attorney said "I think possible I sold this F. M. Dell of Indianapolis, Indiana, a car, and probably offered for sale to The Consumers Coal & Supply Company, Elkhart, Indiana; those two I think possibly I sold." On cross-examination the witness testified he recalled that he had sold Frank M. Dell and The Consumers Coal & Supply Company.

On cross-examination witness testified that he left the employment of The Matthew-Addy Company sometime in July, 1918, that "possibly" he was discharged. He had a conference with the United States attorney or a representative of the Department of Justice in regard to testifying in the case. This conference was in the Federal Building at Cincinnati. He did not advise the United States attorney or any representative of the Department of Justice that Mr. Ford had authorized or fixed the price of the coal at \$3.50. The substance of his conversation with them was that the witness was asked as to who was in charge of the coal department of The Matthew-Addy Company.

It was thereupon stipulated between counsel for the government and for the defendants in respect to counts five and six of The Matthew-Addy indictment that the purchaser of the coal covered
52 by said counts, The Wagner Manufacturing Company of Sydney, Ohio, purchased the two cars as one transaction on September 7, 1917, without previous contract.

In respect to the twelfth and thirteenth counts in the indictment against The Matthew-Addy Company covering two cars, being one transaction, that the purchaser, Connellsville Lumber Company, had no contract for the purchase prior to September 12, 1917.

The Court: Does the Government rest with that?

Mr. Roudebush: Yes, Your Honor.

Mr. Graydon: If Your Honor please, I move to dismiss the indictments, each of them, and each count separately.

The Court: Gentlemen of the jury, you may have a recess until you are called.

Thereupon the Jury retired from the court room.

Mr. Graydon: At the close of the evidence for the Government the defendants, and each of them, move the court to dismiss the cases and each count of each indictment, separately, on the ground that the indictments state no offense, and that the evidence fails to substantiate the allegations of the indictment and each count therein, respectively, and on the grounds, and especially relying upon all the grounds heretofore stated in support of the motions to quash and the demurrers.

And the defendants, and each of them, move the court separately to dismiss the first count of the indictment against The Matthew-Addy Company, on the ground that it appears that the transaction did not occur within the jurisdiction of the court; and the same in respect to the second count of the indictment against The Matthew-Addy Company; and the same in respect to the third count.

And if said motion in respect to the second and third counts be not granted, defendant, The Matthew-Addy Company, moves the court to require the Government to elect whether it will proceed upon said second count or said third count, on the ground that the evidence shows that they constituted a single transaction within the meaning of the statute.

And defendant, The Matthew-Addy Company, moves the court to dismiss the fourth count on the ground that the evidence showed that the transaction occurred outside the jurisdiction of the court.

And in regard to the fifth and sixth counts, being sales
53 to the Wagner Manufacturing Company of Shelby County, Ohio, defendant moves to require the Government to elect upon which count it will proceed, on the ground that the two constitute a single transaction.

In regard to the seventh and eighth counts defendant moves the court to dismiss the same on the ground that the transactions occurred outside the jurisdiction of the court; and, if said motion be not granted, to require the Government to elect upon which it will proceed, on the grounds heretofore stated.

In respect to the thirteenth count and the fourteenth count, de-

defendant moves the court to require the Government to elect, on the ground that the two constitute a single transaction under the statute.

In regard to the eighteenth count defendant moves the court to dismiss, on the ground that the transaction occurred outside the jurisdiction of the court. The same motion in regard to the nineteenth count. And if said motions in respect to either of said eighteenth or nineteenth counts be not granted, to require the Government to elect upon which it will proceed, the two constituting a single transaction under the statute.

And the defendant moves the court, in respect to the nineteenth, twentieth, twenty-first, twenty-second and twenty-third counts, to dismiss the same, and each of them, on the ground that the evidence shows that they occurred outside the jurisdiction of the court; and in regard to, and if said motion be not granted in respect to said twentieth, twenty-first, twenty-second and twenty-third counts, defendant moves the court to require the Government to elect upon which of said four counts it will proceed, upon the ground that said four carloads covered in each of said counts constitute one transaction within the meaning of the statute.

In the indictment against B. N. Ford defendant moves the court to dismiss the first count, on the ground that the transaction occurred without the jurisdiction of the court; and the same motion in respect to the second, third, and fourth counts; and if such motion be not granted in respect to any or all of said counts, said defendant moves the court to require the Government to elect upon which of said counts it will proceed, on the ground that they all constitute a single transaction within the meaning of the statute.

In respect to the fifth and sixth counts, defendant moves 54 the court to require the Government to elect upon which it will proceed, upon the ground that said two counts constitute a single transaction under the statute. And the same motion in respect to the seventh and eighth counts. And the same motion in respect to the tenth and eleventh counts.

The Court: Anything else?

Mr. Graydon: I would like to present to Your Honor another ground that hasn't been suggested specifically for holding these indictments bad, if it isn't too late to suggest it.

The Court: Proceed.

Thereupon counsel proceeded to present the point suggested to the court, after which the following proceedings were had:

The Court: This morning I sustained objection of the defendant to evidence proposed by the Government to show that defendants had knowledge of the rules promulgated. At that time I had not in mind the exact language of the penal clause of Section 25 of the Lever Act, providing "that whoever shall, with knowledge of the regulations prescribed under the act, violate," etc. The Government may therefore have leave to recall its witness upon the subject of such knowledge.

With reference to the term in the indictment "profit or gross margin," if we assume—and it would be fair to assume—that some expense attaches to the business of jobbing coal, the terms "profit"

and "gross margin" would not be synonymous with the profit to be taken to mean net profit, but if the profit be understood to mean in the indictment "gross profit" then the two terms would be synonymous. And whether we read the word "or" in its ordinary significance as "or," or whether we read it as contended by the defendants it is to be read, that is to say, "to-wit," the allegation would be unintelligible unless we understand the word "profit" to mean "gross profit." But, so reading it, it is entirely intelligible—in fact, the words "gross margin" then became a definition of the word "profit." It is as though it were said "profit, that is to say, the gross profit, the difference between the cost price and the selling price." Therefore, it seems that the Government is not restricted to the showing of a net profit exclusive of expenses to sustain the indictment, but to showing that a margin, gross margin, which has been done, is sufficient.

55 The sufficiency of the indictment, generally speaking, has been heretofore passed upon in the ruling on the motion to quash and the ruling upon the demurrer to the indictment. It is now urged that the phrase in the second section of the Presidential Order of August 23, 1917, which reads "For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of fifteen cents per ton of two thousand pounds"—it is contended that the phrase means for a future transaction embracing both buying and selling of coal a jobber shall not add. Whether it be called a regulation of the coal business or a fixing of price, I am of the opinion that it was within the power of the President to prescribe the gross margin that a jobber might earn under the terms of the act. Having in mind the well-known practice of West Virginia bituminous fields to contract in advance for the mine output, the total mine output, or substantially so, from season to season, a regulation prescribing prices of coal that left existing contracts in force and prescribed no margin of profit to the jobber, but permitted him to ask, demand and receive so much in excess of his contract price as he might be able, under the exigencies of the war then existing, to get, would have fallen far short of the regulation of the prices of coal that Congress undoubtedly intended to secure by this law. In my opinion, the phrase "For the buying and selling of bituminous coal a jobber shall not add" means that he shall not hereafter add, whether the contract for the coal took place before or after the promulgation of the Presidential Order.

And, therefore, the motion to dismiss the several counts upon the grounds mentioned is overruled as to each respective count.

Mr. Graydon: Note our exception.

The Court: It is further moved to require the Government to elect between counts in those instances in which the transaction involved a shipment of more than one carload lot. The Government, in the indictments, seems to have regarded each carload necessarily as a separate transaction; but it is not so. The purchase and sale of a certain quantity or tonnage of coal was the transaction, regardless of the number of cars that might be required to contain or trans-

port the same; and inasmuch as one transaction can only be made
the subject of a single count, in each of those instances the
56 Government will be required to elect between or among the
counts covering the single transaction.

Have I covered everything that has been proposed?

Mr. Roudebush: Your Honor, could we adjourn at this point for
the noon recess, until we have an opportunity to check up these
different counts, and also to get our witnesses here?

The Court: Very well. We will at this time recess until two
o'clock. Bring in the jury.

Thereupon the jury were returned into the jury box, and after
they had been duly cautioned by the court a recess was taken until
two o'clock in the afternoon of the same day, at which time the trial
proceeded as follows:

Afternoon Session, Wednesday, June 2, 1920.

Court met pursuant to recess, all counsel being present.

Mr. Graydon: The court did not say anything specifically about
the venue of some of these contracts. I did not know whether that
matter was one that had been overlooked.

The Court: It was overlooked. There were certain of these counts
with regard to the venue. I confess I haven't the evidence as to each
count specifically in mind. I will have to reply upon the assistance
of counsel in that regard, I expect.

Mr. Roudebush: Your Honor, I have Mr. Humphrey here, if you
care to go on with the testimony.

The Court: No, let us pass upon the matter of venue before
we proceed any further with these other counts. The first four
counts of the company indictment were not covered by the
stipulation. What was the evidence with regard to the venue on the
first four counts? The first count was the Alexander Lumber Com-
pany. Someone was here from the Alexander Lumber Company,
was he not? Who was that?

Mr. Roudebush: Mr. McClatchie.

The Court: Well, he said he made the contract with Mr. Zimmer-
man, that he doesn't know whom he paid. As to that count the
motion will be granted, I think, Mr. Roudebush.

Mr. Roudebush: If Your Honor please, there is in evidence
Government Exhibit No. 12, which shows that the payment was
made here at Cincinnati.

The Court: What does it show?

57 Mr. Graydon: It shows it billed or made out at Cincinnati,
that is all.

Mr. Roudebush: It is marked Cincinnati.

The Court: Let the motion on that count be granted, Count
Number One of The Matthew Addy Company indictment.

Now, the second count charges with reference to Fred Kluckhohn.
Did we have anybody with regard to Fred Kluckhohn? He was
the man from Haperville, Illinois?

Mr. Graydon: Naperville, Illinois.

The Court: I got it Naperville. He said he couldn't recollect where the payment was made, except there was an invoice stamped "Paid" at Cincinnati.

Mr. Roudebush: It is in evidence here, marked "The Matthew Addy Company, Cincinnati, Ohio, Paid December 6." Also says, "When due please remit to Treasurer of The Matthew Addy Company, Box 665, Cincinnati, Ohio"; also one marked "Paid" at Cincinnati, Ohio, November 6th.

Mr. Cramer: He testified he purchased that coal from Mr. Zimmerman. Zimmerman gave him the car numbers and he told him he would take them.

Mr. Roudebush: There is also in evidence Exhibit No. 37, showing that The Matthew Addy Company accepted this, by B. N. Ford, Cincinnati, Ohio.

Mr. Cramer: Accepted what? Acknowledged receipt of the order, is all.

Mr. Graydon: Acknowledged receipt of the order.

Mr. Roudebush: On the back of it it says no sale is valid unless accepted by an officer of the company here at Cincinnati.

The Court: I expect the motion will have to be overruled as to this second count.

Mr. Graydon: Note an exception.

The Court: Now, the third one—

Mr. Roudebush: We will elect the second count, Your Honor.

The Court: You elect the second count, do you?

Mr. Roudebush: Yes, Your Honor.

The Court: Let the election be noted. The fourth count is West Pullman Company.

Mr. Graydon: He said he sent the check to the Chicago office.

58 The Court: In the absence of any record evidence, that motion will have to be granted. There was nothing but an invoice.

Mr. Roudebush: There was an invoice and check showing it was paid at the Cincinnati office.

The Court: Is the check there?

Mr. Roudebush: Yes, Your Honor.

The Court: What does the check show?

Mr. Roudebush: Pay to the order of the Citizens National Bank, Cincinnati, Ohio, The Matthew Addy Company by R. M. Lambert, Treasurer. It also has on the bill "Paid The Matthew Addy Company, Cincinnati, Ohio." Also, "When due, please remit to Treasurer, The Matthew Addy Company, Cincinnati, Ohio."

Mr. Graydon: I don't think that request is of any significance, if Your Honor please.

Mr. Roudebush: It is stamped on the bill.

Mr. Graydon: The entire accounting department is here, and having sent the check in payment to the Chicago office, they could transmit it to any place without changing the venue of the offense.

The Court: He said he paid the check to the Chicago office. Let that motion be granted. Now, the next one is what?

Mr. Graydon: The fifth and sixth were Cincinnati transactions.
The Court: That was to elect between the fifth and sixth?

Mr. Roudebush: We elect, Your Honor, to take the fifth, as between the fifth and sixth counts.

The Court: You elected the second as between the second and third, did you?

Mr. Roudebush: The second as between the second and third.

The Court: And you now elect the fifth as between the fifth and sixth?

Mr. Roudebush: As between the fifth and sixth.

The Court: Now, with reference to the seventh and eighth counts?

Mr. Roudebush: We elect the seventh as between the seventh and eighth.

The Court: You elect to stand on the seventh?

Mr. Roudebush: Yes, Your Honor.

The Court: Now the motion is directed against the seventh and eighth also, I believe?

Mr. Graydon: Yes, sir.

59 The Court: South End Supply Company. Was anyone here from the South End Supply Company?

Mr. Roudebush: Yes, Your Honor—Mr. Erickson.

The Court: He said he made payment to Cincinnati, Ohio. Let the motion be overruled.

Mr. Graydon: Note an exception.

The Court: The eighth?

Mr. Roudebush: We elect the seventh as between the seventh and eighth.

The Court: Yes.

Mr. Roudebush: The ninth and tenth, Your Honor, are different transactions, on different dates. The ninth count was ordered on the 26th of August.

The Court: I haven't any motion here to elect between the ninth and tenth. The next motion I have is to elect between the thirteenth and fourteenth.

Mr. Roudebush: We elect the thirteenth as between the thirteenth and fourteenth. This was at Cincinnati. It is covered by the stipulation.

The Court: Now, was there a motion to dismiss as to the thirteenth and fourteenth?

Mr. Graydon: No.

The Court: No. They were covered by the stipulation. What was the next motion to dismiss?

Mr. Roudebush: The eighteenth, I think—eighteenth and nineteenth, to elect.

The Court: The eighteenth count was with Kraft & Company. Kraft was here. He said he paid to Cincinnati, Ohio. Motion overruled.

Mr. Graydon: Note an exception. There was a motion to elect in regard to that.

Mr. Roudebush: We elect the eighteenth as between the eighteenth and nineteenth.

The Court: You elect the eighteenth as between the eighteenth and nineteenth. Twentieth count?

Mr. Graydon: Twentieth, twenty-first, twenty-second and twenty-third are all Frey Brothers, of Chicago, on the 10th of September. Motion to elect as between those four.

Mr. Roudebush: Your Honor, we elect to——

The Court: Wait until I pass on the motion to dismiss, first. Who was here from Frey Brothers?

Mr. Roudebush: George J. Frey.

The Court: He said he paid The Matthew Addy Company
60 by mailing a check to Cincinnati, so the motion to dismiss will be overruled.

Mr. Graydon: Note an exception.

Mr. Roudebush: We elect the twentieth as between the twentieth, twenty-first, twenty-second and twenty-third.

The Court: Very well; we will go back and see which ones of these counts are out.

Mr. Graydon: The first is out.

The Court: Was that dismissed or an election?—Dismissed.

Mr. Graydon: The third is out on an election; fourth was dismissed; the sixth is out on an election; the eighth is out on the Government's election; the fourteenth is out on the Government's election; the nineteenth is out on the Government's election; the twenty-first, twenty-second, twenty-third are out on the Government's election.

The Court: Now we will pass to the Ford indictment. Do you elect the fifth or the sixth count, Mr. Roudebush?

Mr. Graydon: There is an election between the first four.

Mr. Roudebush: The first, second, third and fourth, Your Honor. We elect the first in regard to the first, second, third and fourth.

The Court: Between the fifth and sixth?

Mr. Roudebush: The fifth as between the fifth and sixth.

The Court: Between the seventh and eighth?

Mr. Roudebush: Your Honor, the seventh and eighth were different transactions. That is the one at Batavia, Ohio, one sold on the 26th of August and one on September 8th. That is one I spoke of a minute ago.

Mr. Graydon: I think that is correct.

The Court: Very well; there is no election to be required between those. Between ten and eleven?

Mr. Roudebush: Ten as between ten and eleven.

The Court: Now, which ones—in which ones was the jurisdiction in question? The jurisdiction was questioned, I believe, on the first four counts only. The others were covered by the stipulation.

Mr. Roudebush: Your Honor overruled that. That was Frey Brothers. He was here.

The Court: The fourth count?

Mr. Roudebush: The first three.

The Court: You elect the first count. That is Frey Brothers.

Mr. Roudebush: That is Frey Brothers. He was here.

61 The Court: The motion as to Frey Brothers will be overruled, the first count.

Mr. Graydon: Note an exception.

The Court: That therefore takes out the second, third, fourth, sixth and eleventh counts, does it not?

Mr. Roudebush: Yes.

Thereupon, J. M. HUMPHREY, being recalled as a witness for the government, was asked whether he knew whether Mr. B. N. Ford was aware of the regulation promulgated by the President of August 23, 1917, "whereby the jobbers' gross margin was fixed at 15 cents per ton of 2,000 lbs." On objection being sustained, he was asked whether he had any conversation with B. N. Ford on or about August 23, 1917, relative to said regulation, and answered that he had a conversation with Ford two or three days after the ruling came out. The substance of the conversation was that the witness asked Ford what should be added as a commission of the Matthew Addy Company to coal which the company had on contract and "he advised me that we were to add 15 cents on our regular stuff on which we did have contract, but on the stuff such as that Pocahontas coal we were to add 25 cents per ton as we had been doing." The witness also had other conversations with Ford in respect to rulings that were being promulgated in Washington from time to time and also a discussion with Ford on or about August 23d in regard to the gross margin of 15 cents. Particularly in respect to the coal purchased from the Bluefield Coal & Coke Company, Ford instructed the witness to quote that coal at \$3.50 which he did. Witness stated that he and Ford discussed the government's regulations, which was 15 cents a ton, but said, "I was to add the 25 cents a ton which we had been adding." The witness stated that he (Ford) knew it was in effect; he knew there was a 15 cent gross margin in effect. On motion of defendants this answer was stricken out.

Witness testified to a conversation with Ford on or about August 23, 1917, concerning the regulation of that day and said that Ford told the witness that "the regulation was a gross margin of 15 cents a ton."

The witness stated that on or about August 23, 1917, The Matthew Addy Company was receiving bulletins issued by the Fuel Administration in Washington, containing orders and regulations, and received such a bulletin promulgated August 23, 1917, with 62 reference to jobbers' margins in bituminous coal. The witness further stated that coal journals of the National Coal Jobbers were also received in the office. One publication of this journal the witness stated to the best of his knowledge contained the same issue that was published by the government.

Mr. Ford had the regulation of August 23, 1917, on his desk.

On cross examination the witness stated that in the months of August and September, 1917, he was traveling buying and selling coal possibly in Harlem, Letcher and Perry Counties, Kentucky. Sometime during 1917 he was in East Bernstadt in Laurel County, Kentucky, and also made a trip to West Virginia. Witness could

not state whether he was in Cincinnati any time in August, 1917, or that he was there during the first week in September; nor the second week in September. He ceased to be employed by The Matthew Addy Company in July, 1918, having been with them three years or more.

The witness stated that the first time he ever saw the regulation of August 23, 1917, was in Mr. Ford's office, and that he read it, but could not give the date. Sometime in the fall of 1917 he was at Whitesburg, Kentucky, and later may have been in Lexington. When Mr. Ford discharged the witness from the employment of The Matthew Addy Company he spoke to him about "your habit of drinking."

Thereupon the witness J. M. Humphrey retired from the witness stand.

The Court: Anything further from the Government?

Mr. Roudebush: No.

Mr. Graydon: We renew the motions made, if Your Honor please, on the same grounds and on the additional ground of a failure of proof to show knowledge in respect to any particular time named in the different counts in the indictments.

The Court: Same ruling on it, respectively, the same ruling on each one of the motions that was made before.

Mr. Graydon: Note an exception. We will offer in evidence, if Your Honor please, a copy of what is known as the Lane-Peabody agreement—

Mr. Roudebush: I object to that, and object to any statements before the jury relative to that.

Mr. Graydon: I haven't made any statements, except an offer of it.

63 Mr. Samuels: If Your Honor please, Mr. Roudebush has admitted that this is the paper so designated, without any additional proof.

The Court: Any question about the designation of the paper?

Mr. Roudebush: No, Your Honor. I said they wouldn't have to bring any witnesses to prove the paper.

The Court: Your objection goes to substance, not as to execution of the document?

Mr. Roudebush: Absolutely.

The Court: Perhaps the jurors had best step aside a few minutes.

Thereupon the jury retired from the court room.

The Court: What is the purpose of the offer, please?

Mr. Graydon: If Your Honor please, this agreement was one that was made by a quasi-official body, Secretary Lane and Mr. Peabody representing miners and the Government, and thereunder it fixed certain prices and a commission of twenty-five cents. Now, it has already been testified by this last witness that that commission of twenty-five cents was followed in respect to certain of the coal sold, and he is undertaking to testify further that Mr. Ford had knowledge of the regulation of August 23rd. I think that this

document is competent possibly to rebut any inference of knowledge in regard to that, and indicate from where the twenty-five-cent price which was in force at the same time as this fifteen-cent price, came.

The Court: What is the date of the agreement?

Mr. Graydon: July 28, 1917, never expressly advocated by the parties that made it nor expressly repealed by any proclamation of the President, as far as I know. It was put forth under a conference, under an act of Congress, and the action taken at the conference, as announced in the official proclamation of the Department of the Interior, fixed the prices on bituminous coals at various amounts, and twenty-five cents for a net ton was fixed as the maximum price per ton for coal jobbers' commissions, with only one commission, no matter how many jobbers' hands the coal may pass through.

The Court: Did it fix any fifteen-cent price?

Mr. Graydon: No, Your Honor. It seems to me that is competent especially in relation to this question of the violation of the fifteen-cent regulation with knowledge. The only testimony
64 on that point is rather indefinite as to time, the statement of this witness that Mr. Ford was advised about that fifteen-cent regulation. Now, of course, the jury doesn't have to credit the statement of that witness, and I think they have got a right to know that Mr. Ford before that time knew about the twenty-five-cent commission.

The Court: Well, if the agreement fixed a fifteen-cent rate in certain instances, which would tend to explain the giving of the fifteen-cent rate, the last witness' testimony as to the fifteen-cent rate on non-contract coal, it might possibly reflect upon the situation; but it shows nothing but a twenty-five-cent rate, and that doesn't seem to me to reflect upon his knowledge at all as to this order. I am inclined to think that will have to be excluded.

Mr. Samuels: It might also, if Your Honor please, go to the proposition that will no doubt be renewed at the end of all the testimony, as to the interpretation and the intention of Congress of the Lever Act, what effect this had upon the passing of the Lever Act and the consideration to be given to it by the court, what Congress had in mind when it used the word "contract"—whether it should have a retrospective or prospective aspect. While Your Honor has passed upon it, we wish to renew our motion at the end of the evidence. It may have an important bearing. We could not ask that question before because it was not before the court, but if it is in evidence it would be before the court to pass upon the evidence as it will be renewed in its supplementary form.

Mr. Cramer: This is being introduced to show why the twenty-five cents was fixed, in mitigation of any guilt that might be later determined in this case, and we have a man here to identify—

The Court: That would hardly be a matter for the jury, Mr. Cramer. The present thing before the court is to submit the question of the proof of the indictment before the jury, the competent evidence. The question of mitigation would hardly be for consideration at this time, would it? It is not like a civil—

Mr. Cramer: The court, in its announcement of its decision this

noon, stated he took official knowledge of a certain custom of a certain coal field, and the witness we have to testify as to the Lane-Peabody agreement. We expect to prove it was the custom of the entire coal trade that on contracts entered into under the Lane-Peabody agreement and not sold prior to August 23rd, that the twenty-five cents was charged by the entire trade.

65 The Court: It doesn't seem to me that the document is competent, and the objection will be sustained.

Mr. Graydon: We will offer what is conceded to be a correct copy of the Lane-Peabody agreement, and mark it "Defendant's Exhibit B."

The said document is thereupon marked for purposes of identification as "Defendant's Exhibit B" and is submitted herewith.

Thereupon the jury were returned into the jury box, and the trial proceeded as follows:

FRANK C. DECKEBACH, called as a witness on behalf of defendants, having been first duly sworn, testified as follows:

Examined by Mr. Graydon:

Q. What is your business, Mr. Deckebach?

A. Certified public accountant.

Q. How long have you been engaged in the business of public accounting?

A. Twelve years.

Q. You have an office in Cincinnati?

A. Yes, sir.

Q. I will ask you whether you went over the books and papers and other information, or had the investigation made under your direction, of the selling department, of the department of The Matthew Addy Company which is in the business of selling coal and coke, whether you got those figures for the year 1917?

A. Yes, sir.

Mr. Roudebush: I object.

The Court: Well, he might answer whether he did or not.

A. Yes, sir.

Q. Did you make a statement showing the cost to that company of selling coal and coke by months during that year?

Mr. Roudebush: I object, Your Honor.

A. Yes, sir.

The Court: He may answer whether he did or not. It isn't an important question yet.

Q. Have you the statement with you?

A. No, sir, but I think my—I think——

Q. (Handing document to witness.) I will ask you whether this is the statement that you made, that was made up under your supervision?

A. Yes, sir.

Q. Is that it?

66 A. Yes, sir.

Q. I want to direct your attention to the figures for September, 1917—

Mr. Roudebush: I object, Your Honor.

Q. —and I will ask you what the first item in that month, of coal, 25,315, means?

The Court: I suppose now you are attempting to prove what was stated in the opening concerning the cost of making sales—

Mr. Graydon: Yes, sir.

The Court: —in this month. I will hear from counsel for defendant on the subject. I understand, I think, what you expect to prove.

Mr. Graydon: Yes. Well, we expect to prove, if Your Honor please, that this gross margin—

The Court: I understand what you expect to prove; I believe I have that in mind from the opening statement.

Mr. Graydon: I thought Your Honor asked me.

The Court: No, I am asking the legal phase of the question, what are the claims of the contention?

Mr. Graydon: Our contention is that if the order of the President by itself or under authority of the act of Congress, provided or was intended to provide that The Matthew Addy Company must sell its coal through that department at a loss, that the order and the act of Congress are both unconstitutional and a violation of the Fifth Amendment of the Constitution of the United States, and we propose to produce the evidence to show the fact which would be the basis of the argument of unconstitutionality. And whether it is as interpreted by the court already—as I understand, the ruling on the demurrer is to the effect that the Government doesn't have to show that this twenty-five cents added to the purchase price included any profit; as I understand the construction of the court, the court, in my humble view, has entirely misconstrued the plain, ordinary meaning of the word "profit." "Profit" means profit, as I understand it; it means what is left after you pay the expenses. But I understand that the court has said that the Government is at liberty to insert that word "profit" in an indictment and to allege in the indictment that the company made a profit in excess of fifteen cents, and to relieve the Government of any requirement of offering any proof in support of that allegation. Now, we propose to show

the negative. If that allegation is to be left in the indictment, and the Government is relieved of proof, we propose to show, as a matter of fact, that the fifteen cents did not cover the cost. I submit to Your Honor that it is competent unless the act of Congress and the order of the President proposes to confiscate the services and the property of this defendant under an act which is supposed to deal with profiteering and causes a fine of five thousand on twenty-three counts, and possibly send somebody to jail, when they didn't make a cent of profit.

Mr. Roudebush: Your Honor, I object to these statements before the jury, under the court's ruling.

Mr. Graydon: I am stating what the evidence will propose to show, Mr. Roudebush.

Mr. Roudebush: The court has already ruled on the point.

Mr. Graydon: I don't know that the court has already ruled on it. I suppose if the court has, the court will advise us.

The Court: Just let us proceed. The question of the constitutionality of the act has been before the court, and the opinion of the court upon that subject has been expressed. Congress had the right, under the circumstances and in the exigencies of the war, to delegate to the President of the United States the power to fix prices and prescribe regulations for the production and distribution of coal. Public danger justifies the substitution of executive process for judicial process. Under such circumstances executive process is the equivalent of judicial process. When the President promulgated the regulation in question it was, therefore, promulgated in due process of law. The priority of the regulation promulgated by the President is not open to question. The regulation promulgated by the President in accordance with the act had the force and effect of law. Now, it is like a railroad rate, duly promulgated—it is not open to anyone to say that in any particular transaction, or in any month of transactions, the rate prescribed did not prove profitable to him. It is the rate that was prescribed by the Government of the United States in accordance, as has heretofore been held by the court, with due process of law; therefore, it is not for us to inquire whether, in this particular instance or in this particular month, and to this particular coal jobber, the rate prescribed was a profitable rate or not. The rate was binding upon all upon its promul-
68 gation. Accordingly, the evidence now proposed to be given as to the cost to this particular company, selling coal at this particular time, is not competent, and the objection to this will be sustained.

Mr. Graydon: Note an exception. And now, if Mr. Roudebush doesn't want the jury to hear this, I suggest they might go out. It will be quite long and I don't know that I can whisper it so they won't hear it. I will try to, though.

The Court: Very well; you may state it to the stenographer. I don't know that the jurors will hear it. If they do, I don't think they will pay any attention except to what I admit to them.

Mr. Graydon: Exception noted on behalf of both defendants in respect to each count, and the defendants state that if permitted to answer, the witness would testify that in the month of September, in respect to gross sales of coal in the month of September, 1917, they amounted to 25,315 tons.

(At this point one of the jurors left his seat in the jury box, and thereupon the court excused the jury temporarily and they retired from the court room.)

That he had set off against the total sum of money received therefor all items of expense, to-wit, the net-direct expenses for coal sales,

the net overhead expenses properly chargeable against coal sales, the coal sales expenses of the Chicago branch, and the total expenses of net and overhead of the Chicago branch, and dividing the remainder by the number of tons found that the cost of coal sales in cents per ton for said month was seventeen cents nine mills. Upon the same computation for the month of October, 1917, that the cost of coal sales in cents per ton per month was eighteen and twenty-two one-hundredths cents; that applying the same computation to all coal sales of said company for the year of 1917 he found the average selling cost to be eighteen and ninety-five one-hundredths cents. That further, for the year 1918, the average cost of actual coal sales of the company, in cents per ton per month amounted to seventeen and nine one-hundredths cents. And for the year 1919 the average cost per month of actual coal sales of said company was twenty-seven and six one-hundredths cents; and for the months of January, February and March, 1920, the average cost was nineteen and

thirty one-hundredths cents. And defendant offers the de-
69 tailed statement prepared by the witness Frank C. Deke-
bach, dated May 17, 1920, covering said period from
January 1, 1917, to March 31, 1920, showing all items and made
as aforesaid from the original books, vouchers and other papers of
said The Matthew Addy Company. And defendants' counsel states
that said testimony and said analysis cost of coal sales is offered in
evidence for the purpose of showing that defendant's price of three
dollars and fifty cents per ton upon the sales stated in the indict-
ments did not include a profit, as alleged in the indictment, in
excess of fifteen cents per ton; and further, for the purpose of show-
ing that said order of August 23, 1917, if it limited the gross price
per ton upon the coal purchased prior to the order, by defendants,
to a maximum of fifteen cents, was confiscatory and compelled de-
fendant to dispose of its product without allowance for expense and
a just compensation for its services.

And further, said evidence is offered for the purpose of showing
that said order so interpreted did not conform to the act of Con-
gress, and especially Paragraph 15 of Section 25 thereof, which
provides that "in fixing prices for dealers the commission shall
allow the cost to the dealer and shall add thereto a just and reason-
able sum for his profit in the transaction."

And in connection with said evidence defendants, and each of
them, rely upon the grounds of unconstitutionality in respect to said
act of Congress and said order of the President heretofore set up
and relied upon the motions to quash and demurrers to the in-
dictments.

The statement referred to in the testimony of the witness Frank
C. Dekebach is submitted herewith, marked for purposes of identi-
fication "Defendants' Exhibit C."

Thereupon the jury were returned into the jury box, and the trial
proceeded as follows:

ROBERT A. COLTER being called as a witness for defendant stated
he had been in the coal and coke office for about thirty years and

was familiar in 1918 with the publication known as the National Coal Jobbers' Association Bulletin. Witness in 1917 and 1918 had been president of the Cincinnati Coal Exchange, a branch of the Cincinnati Chamber of Commerce. The bulletins of the National Coal Jobbers' Association were not published until the organization of that association which was several months after August 1, 1917; there were no such publications in August or September, 1917. On cross examination, the witness stated the purposes for which the National Coal Jobbers' Association was formed, and that the time was not earlier than three months after August 23, 1917. Mr. B. N. Ford was a member of that association.

Thereupon the witness Robert A. Colter retired from the witness stand.

Mr. Graydon: That's all, Your Honor.

The Court: Has the Government anything further?

Mr. Roudebush: No, Your Honor.

The Court: Proceed to the jury.

Mr. Graydon: We renew the motions heretofore made at the close of the Government's case, each and all of them, in respect to all the counts, and on the grounds stated in the motions to quash and the demurrers and in support of said motions.

Overruled and exceptions noted.

The Court: Same rulings, respectively.

Mr. Samuels: May we reopen the question that was presented this morning to Your Honor on the interpretation of that Paragraph 16? There is an additional argument Mr. Cramer wishes to make, if Your Honor will permit us to reopen.

The Court: On what subject?

Mr. Samuels: The interpretation of the word "contract"—a question of statutory construction. I think Mr. Cramer has something additional to state.

The Court: I will be very glad to hear from either of the counsel that have anything further to say with regard to construction.

Mr. Samuels: I will ask that the jury be dismissed.

The Court: You may proceed if there is anything further to be said upon it.

Mr. Cramer: Mr. Graydon covered my argument that I intended to make, in his reargument after lunch.

Mr. Graydon: Will you hear from Mr. Samuels?

The Court: Yes.

Mr. Samuels: I ask that the jury be dismissed.

Thereupon the jury retired from the court room.

Mr. Graydon: Defendants called attention and suggested to offer in evidence the order of the President of August 21, 1917, fixing bituminous coal prices, and the order of August 23, 1917, fixing anthracite coal prices, and defining jobbers and fixing their commissions, and the order of September 6th—

71 The Court: Wouldn't you say their margins, rather than commissions?

Mr. Graydon: Yes, their margins; and the order of September 6, 1917, issued by the United States Fuel Administrator, and the order of October 6, 1917, of the Fuel Administrator, and the court stated that for the purposes of this case they would be noticed judicially.

Thereupon Mr. Samuels proceeded with his argument to the court, after which the jury were returned into the jury box and the following proceedings were had:

Mr. Graydon: If Your Honor please, we have some charges that we would like to have given specially or in the charge. I don't think there is anything new that Your Honor hasn't passed on (charges handed to the court).

The Court: The first will be refused.

Mr. Graydon: Note an exception.

The Court: The second will be refused.

Mr. Samuels: Exception.

The Court: The third will be refused.

Mr. Samuels: Exception.

The Court: The fourth will be refused.

Mr. Samuels: Exception.

The Court: The fifth will be refused.

Mr. Samuels: Exception.

The Court: The sixth will be refused.

Mr. Samuels: Exception.

The special charges requested by counsel for defendants refused by the court are as follows:

SPECIAL CHARGE No. 1.

There have been produced in evidence two contracts entered into by The Matthew Addy Company with the Bluefield Coal & Coke Company dated July 31st, 1917, in which 80 cars of coal were contracted to be purchased.

If you find from the evidence that the sales of coal made by the defendants which are complained of in the indictment were sales of the same coal contracted for purchase from the Bluefield Coal & Coke Company on July 31st, 1917, then such sales are exempted from the Act of Congress of August 10th, 1917, which law is known as the "Lever Act" and I therefore charge you as a matter of law that you must return a verdict of "Not Guilty."

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SPECIAL CHARGE No. 2.

If you find from the evidence that the gross margin of 15 cents per ton for jobbers as fixed by the President on August 23rd, 1917 does not include defendants' costs of doing business and a just and

reasonable sum for profit, then I charge you as a matter of law that you must return a verdict of "Not Guilty."

SPECIAL CHARGE No. 3.

The purpose of the Lever Act upon which the indictments in these cases are found is to prevent the making of unreasonable profits in the sale of coal. What is a reasonable or unreasonable profit is for you to determine from all the evidence and all the circumstances of the cases and if you find from the evidence that the defendants did not make any unreasonable profits in the sales of coal complained of in the indictments, then I charge you that you must return a verdict of "Not Guilty."

SPECIAL CHARGE No. 4.

The order of the President of August 23, 1917 part of which is set forth in the indictment, applied only to jobbers and only in respect to coal dealt in by them, both bought and re-sold, after the issuance of the order of August 23, 1917; and unless the jury find beyond reasonable doubt, that the coal covered by the indictment was purchased by defendant The Matthew Addy Company after August 23, 1917, they shall find defendants, and each of them, not guilty.

SPECIAL CHARGE No. 5.

The Act of Congress contemplates that a jobber, for the buying and selling of coal, should be entitled to his expenses and a just compensation for his services, and unless the jury should find, that the order of August 23, 1917, provided for and allowed such expense and compensation, they shall find defendants, and each of them, not guilty.

SPECIAL CHARGE No. 6.

The indictment charges in each count that the price of \$3.50 per ton demanded and received by the defendant The Matthew
73 Addy Company, included a profit or gross margin of 25 cents per ton, which was in excess of the profit or gross margin of 15 cents per ton fixed by said order of August 23, 1917. Profit, in these indictments, means the amount of sum remaining after the deduction of all cost and expense; and I charge you, that unless you find beyond a reasonable doubt, that said sum of 25 cents per ton added by defendant The Matthew Addy Company to its purchase price of \$3.25 per ton, included a profit, as above defined, in excess of 15 cents per ton, you shall find defendants and each of them not guilty.

Thereupon, after counsel for both sides had completed their arguments to the court and jury, the court charged the jury, as follows:

The Court: Gentlemen of the jury, it becomes now my duty to charge you as to the law in this case. The law as I charge it to

you is binding upon you; you must take the law from the court. You are the sole judges of the facts. Applying the law as I shall give it to you to the facts as you find them to be from the evidence, you will reach your conclusion in this case.

The Congress of the United States, by a law approved August 10, 1917, enacted for the purpose of the national security and defense during the recent war, provided that the President should be, and he was, thereby authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke wherever and whenever sold, either by producer or dealer, and to establish rules for the regulation of, and to regulate, the method of production, sale, shipment, distribution, apportionment or storage thereof among dealers and consumers, domestic and foreign. And pursuant to this authority so conferred upon him by the Congress of the United States, the President of the United States did, on the 23rd day of August, 1917, promulgate certain regulations relating to the supply of fuel, among others, as follows:

"A coal jobber is defined as a person (or other agency) who purchases and resells coal to coal dealers or to consumers without physically handling it on, over, or through his own vehicle, dock, trestle or yard.

For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of 15 cents per ton of 2,000 pounds."

74 You are considering now two cases simultaneously, each upon the evidence now before you. All of the evidence now before you is applicable, so far as it pertains thereto, to each of the indictments now being tried.

The first is against the defendant The Matthew Addy Company; the second is against the defendant Benjamin N. Ford. What I shall say generally to you has reference to each of these indictments and to each count thereof.

The presumption is that the defendant, that is to say each defendant, is innocent, and this presumption follows until it is overthrown by evidence of his guilt beyond a reasonable doubt. He is presumed to be innocent until he is proven guilty, so that you will begin your deliberations upon that basis, remembering that the mere fact that a defendant has been indicted by the grand jury in and of itself raises no presumption of the guilt of the defendant. One charged with the commission of an offense can be convicted only upon the evidence produced at his trial.

The burden of proof is upon the Government of the United States to prove the crime charged as to each count of these indictments, to prove the crime charged and all its essential elements, beyond a reasonable doubt. By a reasonable doubt is meant this: When you lack an abiding conviction to a moral certainty of the truth of the charge, considering all the evidence, then you have a reasonable doubt. A reasonable doubt is an honest uncertainty. If you have an honest uncertainty then you have a reasonable doubt. It is not a mere captious doubt, such as might, by some process of ingenuity,

be raised in the mind; to be a reasonable doubt it must be an honest uncertainty.

So far as circumstantial evidence is considered, each circumstance must be proven beyond a reasonable doubt, and the consequences must flow naturally from the circumstances thus established.

Now, what are the essential elements of the indictments which you have under consideration?

As to the indictment against The Matthew Addy Company, the law is set forth in the first count; but the law you will take from the court as I give it to you. The presidential order is set forth, but I have already charged you as to the existence of the presidential

order, and that you will assume to be established, for that
75 presidential order has the force of law, and it is, so far as your consideration of this case is concerned, a law, and you will assume it to be so.

The indictment states that The Matthew Addy Company was, in the months of September, October and November, 1917, a corporation organized and existing under the laws of the state of Ohio. That has been admitted by the defendant The Matthew Addy Company, so that you may assume that that is proven to be true. And that it was conducting, within the jurisdiction of this court, the business of a coal jobber. That likewise has been admitted, and of that no question is made. That continuously, during the months of September, October and November, 1917, a state of war existed between the United States of America and the Imperial German Government and its allies, and the law, orders and regulations above referred to were in full force and effect. As to the existence of the war you need no proof of that; the court takes judicial notice, and you will therefore know, as you do know in your own minds, that the war was then in existence. The indictment then charges, taking the second count, the first count having been dismissed, that on or about the 7th day of September, in the year 1917, in the city of Cincinnati, county of Hamilton and state of Ohio, and within the jurisdiction of this honorable court, The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Fred R. Kluckhohn, doing business in Naperville, Illinois—that is an essential averment—for a certain quantity of bituminous coal, to-wit, about 49.85 tons of 2,000 pounds each of Pocahontas run-of-mine coal—that is an essential averment, but it is not necessary that the quantity should be precisely that charged in the indictment—a price of three dollars and fifty cents per ton F. O. B. at the mines producing said coal—that is an essential averment—which said price of three dollars and fifty cents per ton included a profit or gross margin to it, the said The Matthew Addy Company, as such coal jobber, as aforesaid, of twenty-five cents per ton—that is an essential averment, and I charge you that "profit" as there used means the same as gross margin, that is, the difference between the purchase price and the selling price—which said profit or margin of twenty-five cents per
76 ton was well known by said The Matthew Addy Company to be in excess of the profit or gross margin of fifteen cents

per ton of 2,000 pounds permitted by the law, executive order or regulations above referred to, to be added to the purchase price of said jobber. That is an essential element, and it is essential for the Government to establish beyond a reasonable doubt that the defendant The Matthew Addy Company, knew of the regulation of the President which I have read to you fixing the gross margin at fifteen cents per ton. I charge you that the knowledge of its officer in control and direction of its activities as a coal jobber would be the knowledge of the corporation, if that has been shown. Such knowledge must be shown beyond a reasonable doubt. And the grand jurors further present that said The Matthew Addy Company did not have any contract with said Fred R. Kluckhohn, made in good faith prior to said 23rd day of August, 1917, in which said contract the price for the purchase and sale of said coal was fixed. That is an essential averment of this indictment.

Now, gentlemen, the other counts are in the same terms. As to Counts Numbers 1 and 4, the evidence shows no offense committed within this jurisdiction, and your verdict on Counts Numbers 1 and 4 in the indictment against The Matthew Addy Company will be not guilty. Counts 3, 6, 8, 14, 19, 21, 22 and 23 are withdrawn from your consideration and dismissed, because the matters therein charged are charged also in other counts to be considered by you. You will, therefore, pass upon counts numbered 2, 5, 7, 9, 10, 11, 12, 13, 15, 16, 17, 18 and 20. I have indicated in lead pencil upon the indictment, upon the face of those counts, those which are omitted or dismissed. Count Number 2 charges a sale to Fred R. Kluckhohn, Naperville, Illinois, September 7, 1917; Count Number 5 charges a sale to The Wagner Manufacturing Company, Shelby County, Ohio, September 7, 1917; Count Number 7 charges a sale to the South End Supply Company, Chicago, Illinois, September 13, 1917; Count Number 9 charges a sale to Rice & Laub, of Batavia, Ohio, August 25, 1917; Count Number 10 charges a sale to Rice & Laub, Batavia, Ohio, September 8, 1917; Count Number 11 charges a sale to The Boye & Emmes Machine Tool Company, of Cincinnati, Ohio, September 14, 1917; Count Number 12 charges a sale to the Connersville Lumber Company, Connersville, Indiana, September 12, 1917; Count Number 15 charges a sale to Frank M. Dell, of Indianapolis, Indiana, September 15, 1917; Count Number 16 charges a sale to the Whetstone Coal Company of Cincinnati, Ohio, September 11, 1917; Count Number 17 charges a sale to D. G. McFadden Grain Company of Rdgeville, Ohio, September 24, 1917; Count Number 18 charges the sale to Kraft & Co. of Cook County, Illinois, September 13, 1917; Count Number 20 charges a sale to Frey Brothers, of Chicago, Illinois, on September 20, 1917. The same rules are applicable as to each count.

Now, as to the indictment against Benjamin N. Ford, Counts Numbers 2, 3, 4, 6 and 11 are withdrawn from your consideration and dismissed, the matters therein charged being covered by other counts. You will therefore pass upon the remaining counts, Numbers 1, 5, 7, 8, 9, 10 and 12. Count Number 1 charges a sale to

Frey Brothers, Cook County, Illinois, September 10, 1917; Count Number 5 charges a sale to the Wagner Manufacturing Company, Sidney, Shelby County, Ohio, September 7, 1917; Count Number 7 charges a sale to Rice & Laub, Batavia, Ohio, August 26, 1917; Charge Number 8 charges a sale to Rice & Laub, Batavia, Ohio, September 8, 1917, one of those sales to Rice & Laub being August 26th, and the other September 8, 1917; Charge Number 9 charges a sale to Connersville Lumber Company, Connersville, Indiana, September 12, 1917; Charge Number 10 charges a sale to Consumers Coal & Supply Company, Elkhart, Indiana, September 13, 1917; Charge Number 12 charges a sale to Whetstone Coal Company, Cincinnati, Ohio, September 11, 1917.

The preliminary allegations in the first count of this indictment, as to the passage of the National Defense Act and the promulgation of the presidential order, which I have stated to you, are the same as in the other indictment.

It is also charged that The Matthew Addy Company was a corporation, as in the other indictment, in business as a coal jobber. It is further charged that Benjamin N. Ford, late of the said city of Cincinnati, county of Hamilton and state of Ohio, during all of said times was, and still is, the vice-president of said The Matthew Addy Company, and in such official capacity had charge, control, supervision and direction of the activities, negotiations and con-

78 tracts of said company insofar as they related to the conduct of its business as a coal jobber; that continuously during the months of September, October and November, 1917, a state of war existed between the United States of America and the Imperial German Government and its allies, and the law, orders and regulations above referred to were in full force and effect.

It is an essential allegation to be proven that the said Benjamin N. Ford was vice-president, and in such official capacity had charge, control, supervision and direction of the activities, negotiations and contracts of the company insofar as they related to the conduct of its business as a coal jobber.

It is further presented that within this jurisdiction, on the 10th of September, 1917, Benjamin N. Ford, acting in his capacity as aforesaid with The Matthew Addy Company, doing business as a coal jobber, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Frey Brothers, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to-wit, about 50.30 tons of 2,000 pounds each of Pocahontas run-of-mine coal, a price of three dollars and fifty cents per ton, F. O. B. at the mines producing said coal, which said price of three dollars and fifty cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber as aforesaid, of twenty-five cents per ton—all of that is a material and essential allegation of the indictment; those elements are all essential to be proven by the Government beyond a reasonable doubt—which said profit or margin of twenty-five cents per ton was, and was well known by the said Benjamin N. Ford,

vice-president, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of fifteen cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber. That, gentleman of the jury, is an essential element to be established beyond a reasonable doubt. It must appear that the said Benjamin N. Ford so knew, that he had knowledge of the presidential regulations fixing the margin, the gross margin of the jobber at fifteen cents per ton. And, that said The Matthew Addy Company did not have any contract with said Frey Brothers, made in good faith prior to said 23rd day of August, 1917, in which said contract the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, 79 vice-president of said The Matthew Addy Company, as aforesaid. Those also are essential elements to be established.

Now, the other counts are in substance the same, the names of the purchasers, the exact quantities, and the precise dates of the sales, of course, varying in the different counts as they also do in the indictment against the defendant The Matthew Addy Company.

A corporation, gentlemen of the jury, acts by its officers. If the defendant The Matthew Addy Company, acting by its officer duly authorized to have charge, control, supervision and direction of the activities of said company, so far as they related to the conduct of its business as a coal jobber, was guilty of the offenses charged in the respective counts in the indictment against that company, then the company itself was guilty. One who aids, abets, counsels, commands, induces or procures the commission of an offense defined in any law of the United States is himself a principal therein. And so, if an offense committed by a corporation was aided, abetted, counseled, induced, or procured by an officer thereof, the fact that the corporation may be found guilty of such an offense does not preclude the conviction of its officer; or, vice versa, the conviction of the officer does not preclude the conviction of the corporation thereon.

Now, as to each of these indictments, if you find that each of the essential elements of each count, respectively, of these indictments, as I have explained them to you, has been proven true beyond a reasonable doubt, you will find a verdict of guilty upon such counts, respectively. On the other hand, unless you do find that each essential element of a count of this indictment has been proven true beyond a reasonable doubt, then you will find a verdict of not guilty as to each count concerning which that is so, respectively.

You, gentlemen of the jury, are not concerned with the penalty to be inflicted in case the defendant is found guilty. That responsibility is upon the court. You simply have to say, upon the evidence and under the law as I have given it to you, as to each count in each of these indictments, whether the defendant has been proven guilty thereon beyond reasonable doubt or not.

You are the sole judges of the credibility of the witnesses here produced before you. You may consider, in judging their
 80 credibility, their demeanor upon the witness stand; any bias or prejudice that they may have shown, if they have shown any; their interest in the outcome of this trial, if any they have; the probability, the reasonableness of their testimony. You will give all the circumstances bearing upon their testimony consideration, and then you will accord to the testimony of each witness such credit as you find it entitled to receive. You are not necessarily, or as a matter of law, bound by the greater number of witnesses, but of course, in this case, except as to one issue, the defendant has produced but one witness. However, you are not necessarily or as a matter of law bound by the greater number of witnesses, although, of course, that is a matter for you to consider. You can not arbitrarily, and without being able to give yourself a good reason therefor, reject any of the testimony of any witness.

Gentlemen of the jury, you will now take each of these cases, give consideration thereto, fairly, calmly and impartially, and when you have arrived at your conclusions you will report to the court. I will send you the list of counts which have been withdrawn from your consideration and those which still remain to be considered by you.

Is there anything further, gentlemen of counsel?

Mr. Graydon: If Your Honor please, in connection with the statement made to the jury on the issue of knowledge, that defendant produced only one witness, I would like to ask Your Honor to call attention of the jury to the fact that the Government produced only one witness.

The Court: Yes. Gentlemen of the jury, I call your attention to the fact that likewise the Government produced but one witness on the subject.

Mr. Graydon: We would like to reserve an exception to that part of the charge in which the court defined "profit" as being equivalent to gross margin, and also a general exception to the charge.

I would like, Your Honor—I would like to suggest also that Your Honor, while the court stated very clearly that it was necessary for the Government to establish knowledge of the defendant of the existence of the regulation beyond a reasonable doubt, I don't think the court made it clear that that knowledge must have existed in respect to each count at the time of the transaction in that count, respectively.

The Court: I thought I made that clear. However, gentlemen, I will amplify that charge, and say that the knowledge
 81 which must be shown of the regulation of the President must have existed at the time of the transactions related in each count respectively.

You may retire, gentlemen of the jury, and deliberate upon your verdict.

Defendants and each of them excepted to the general charge.

Whereupon the jury returned a verdict of guilty against each of the defendants upon the several counts in indictments submitted by the court to the jury, as appears of record; to which verdict each of the defendants then and there excepted, and afterwards, at said term and within the time allowed by law, each defendant filed a motion to set aside the verdict and for a new trial, upon consideration whereof the court overruled said motions as also appears of record to which each of said defendants excepted.

Whereupon said defendants filed a motion in arrest of judgment upon consideration whereof the court overruled said motions, all as appears of record, to which rulings of the court the defendants and each of them excepted and thereupon the court entered judgment and pronounced sentence, as also appears of record.

And thereupon, to-wit, upon this 26th day of November, 1920, the court having heretofore by orders duly entered extended the time for preparation, signing, allowance and filing of a Bill of Exceptions to December 15, 1920, present and submit this their Bill of Exceptions and pray that the same be allowed, signed and sealed, and made a part of the record, and the assignments of error having been filed, and said bill of exceptions being found by the court to be true, the same is hereby allowed, settled, signed and sealed and made a part of the record in this case on this 26th day of November, 1920, within the time allowed as aforesaid. Peck, United States District Judge of said District.

82

PETITION FOR WRIT OF ERROR.

[Filed July 6, 1920.]

Defendant, Benjamin N. Ford, prays for a writ of error from the United States Circuit Court of Appeals for the Sixth Circuit to review the judgment entered and sentence pronounced against him in this proceeding on June 23, 1920, and he files herewith an assignment of errors and prays that the writ of error shall operate as a supersedeas and that he be admitted to bail pending the determination of proceedings on said writ of error. Lawrence Maxwell, Nelson B. Cramer, Julius R. Samuels, Joseph S. Graydon, Attorneys for Benj. N. Ford.

ASSIGNMENT OF ERRORS.

[Filed July 6, 1920.]

Defendant, Benjamin N. Ford, assigns as errors prejudicial to him, in the record, proceedings, judgment and sentence of the court in the above entitled cause, that the court erred:

1. In overruling and not sustaining the motion to quash the indictment and each and every count thereof, which motion should have been sustained on each of the following grounds:

Said indictment and each of its several counts is insufficient in law and fact.

83 Said indictment and each of its several counts charges in each count several separate and distinct alleged offenses and is bad for duplicity.

Said indictment and each of its several counts charges no indictable offense under the laws of the United States.

That the averments in said indictment as to the form of same and the manner in which said offense is charged, are so vague, indefinite, uncertain, argumentative and misleading that the defendant is not properly informed of the charge against him or what he shall meet at the trial and can not prepare his defense.

That the indictment and each of its several counts, alleges a violation of the orders, proclamations, publications and regulations of the President of the United States of August 21, 1917, and August 23, 1917, and those subsequent thereto, without stating what subsequent regulations, proclamations, etc., were violated.

That the indictment is not in the form of nor does it conform to the Act of Congress alleged to have been violated.

2. In overruling and not sustaining the demurrer to the indictment and each count thereof, which demurrer should have been sustained on each of the following grounds:

That the Act of Congress and the rules, regulations, promulgations and publications of the President and the United States Fuel Administrator, are indefinite, uncertain and misleading and do not clearly describe the offense.

That the Act of Congress and the rulings, regulations, etc., are unconstitutional for the following reasons, to-wit:

They violate the Fifth Amendment to the Constitution of the United States, in that defendant is deprived of his property without due process of law.

They violate the tenth amendment to the Constitution of the United States in that they interfere with the rights of the respective States, as to regulation of industries within those States.

The Act of Congress of August 10, 1917, violates Section 1, of Article 1, Section 1 of Article 2 and Section 1 of Article 3 of the Constitution of the United States in that it delegates legislative and judicial powers to the President of the United States, to the United States Fuel Administrator appointed by the President, and the Federal Trade Commission.

84 That the Act of Congress violates clause 1 of Sec. 8, of Article 1, and clause 11 of Section 8, of Article 1 of the Constitution of the United States in that, it is an abuse of the power given to Congress to provide for the national security and defense.

The ruling of the President of the United States under date of October 6, 1917, violates clause 3 of Section 9 of Article 1 of the Constitution of the United States in that it is an ex post facto law.

3. In sustaining the objection of counsel for the Government to defendant's offer to prove that the profit of The Matthew Addy Company upon each and every transaction upon which the indictment and the several counts thereof were based was not in excess of 15 cents per ton of 2,000 lbs.

4. In overruling and not sustaining defendant's motion at the close of the Government's evidence to dismiss the cause and discharge defendant.

5. In overruling and not sustaining defendant's motion at the close of all the evidence to instruct the jury to return a verdict for defendant.

6. In charging the jury that the word "profit" in the indictment, at each of the places where said word appears was the equivalent of the words "gross margin," and in charging the jury that they might return a verdict against defendant in the absence of proof that The Matthew Addy Company made a profit per ton on the coal covered by the indictment in excess of 15 cents.

7. In charging the jury that defendant might be found guilty for violation of the order of the President of August 23, 1917, although the undisputed evidence showed that in respect to each transaction covered by the indictment the coal had been purchased by The Matthew Addy Company prior to that day and prior to August 10, 1917.

8. In overruling the motion for a new trial.

9. In overruling the motion in arrest of judgment when the same should have been sustained on each of the grounds stated therein in respect to each of counts 1, 5, 7, 8, 9, 10 and 12, on which defendant was found guilty, which grounds were as follows:

The provisions of the Act of Congress of August 10, 1917, 40 Stat., 276, known as the National Defense (Lever) Act, and especially Sections 1, 2, 3, 4 and 25 thereof, and the promulgation of the order of the President issued August 23, 1917, and especially Sections 1 and 2 thereof, are, as construed and applied by the judgment of the court, unconstitutional and void, in that they attempt to create offenses and impose penalties repugnant to the Constitution of the United States, especially Section 1 of Article 1, Section 1 of Article 2 and Section 1 of Article 3; and to the provisions of the Fifth Amendment that no person shall be deprived of life, liberty and property without due process of law; and to the provisions of the Sixth Amendment that in all criminal cases the accused is entitled to be informed of the nature and cause of the accusations against him; and to the Tenth Amendment reserving to the States, or to the people thereof, powers not delegated to the United States; and to Clause 1 of Sec. 8 of Art. 1, and Clause 11 of Sec. 8 of Art. 1 of the Constitution of the United States.

The averments of each of said counts are too general, vague, uncertain and indefinite to state an offense, or to inform defendant of the nature and cause of the accusation or to apprise him, with such reasonable certainty of the offense with which he is charged, and which he may be expected to meet on a trial, as to enable him to make his defense.

Each of said counts undertakes to charge separate and distinct offenses, and is bad for duplicity.

Upon certain of said counts, conviction was had for acts committed outside the jurisdiction of the court.

10. The District Court erred in entering final judgment against defendant.

Wherefore defendant prays that the judgment of the District Court may be reversed. Lawrence Maxwell, Nelson B. Cramer, Julius R. Samuels, Joseph S. Graydon, Attorneys for Defendant, Benjamin N. Ford.

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ORDER ALLOWING WRIT OF ERROR.

[Filed July 6, 1920.]

This sixth day of July, A. D. 1920, came the defendant Benjamin N. Ford, by his attorneys, and filed herein and presented to the court his petition praying for the allowance of a writ of error from the United States Circuit Court of Appeals for the Sixth Circuit, to operate as a supersedeas, and filed therewith assignments of error.

On consideration whereof the court allows and signs a writ of error as prayed for to operate as a supersedeas. Peck, J.

WRIT OF ERROR.

[Filed July 6, 1920.]

UNITED STATES OF AMERICA,
Sixth Judicial District, ss:

United States Circuit Court of Appeals for the Sixth Circuit.

The President of the United States to the Honorable the Judge of the District Court of the United States for the Southern District of Ohio, Greeting:

Because of the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you or some of you, between The United States of America, plaintiff, and Benjamin N. Ford, defendant, a manifest error hath happened, to the great damage of said Benjamin N. Ford, as by his complaint appears. We being willing that error, if any hath been, should

87 be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the 5th day of August next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals, may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 6th day of July in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the

United States of America the one hundred and forty-fifth. —
—, Clerk of the District Court of the United States for the Southern District of Ohio.

Allowed by Peck, J., Judge U. S. District Court, S. D. O.

CITATION.

[Filed July 6, 1920.]

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

United States Circuit Court of Appeals for the Sixth Circuit.

To the United States of America, Greeting:

88 You are hereby cited and admonished to be and appear
at a session of the United States Circuit Court of Appeals for
the Sixth Circuit, to be holden at the City of Cincinnati,
in said Circuit, on the 5th day of August next, pursuant to a Writ
of Error, filed in the Clerk's Office of the District Court of the
United States for the Southern District of Ohio, wherein Benjamin
N. Ford is plaintiff in error, and you are defendant in error, to
show cause, if any there be, why the judgment rendered against the
said plaintiff in error as in the said writ of error mentioned, should
not be corrected, and why speedy justice should not be done to the
parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of
the United States, this 6th day of July, in the year of our Lord
one thousand nine hundred and twenty, and of the Independence
of the United States of America the one hundred and forty-fifth.
Peck, Judge U. S. District Court S. D. O.

Service of the within Citation hereby acknowledged this 6th day
of July, 1920. James R. Clark, U. S. Attorney S. D. O., by Mr.
Thos. H. Morrow, Asst. Dist. Attorney.

ORDER EXTENDING TIME.

[Filed July 6, 1920.]

On application of defendant Benjamin N. Ford it is ordered
that the writ of error from the United States Circuit Court of Ap-
peals for the Sixth Circuit allowed upon his petition shall operate
as a supersedeas, that the time for making return to said writ of
error and for the filing and allowance of a bill of exceptions be
89 extended to October 1, 1920, and that said defendant remain
at liberty under the recognizance heretofore entered into by
him, for his appearance before this court from day to day as

the court may require, pending the determination of proceedings on said writ of error. Peck, J.

ORDER EXTENDING TIME.

[Filed September 25, 1920.]

Upon application of defendant and for good cause shown the time for making return to the writ of error and for filing and allowance of a bill of exceptions is extended to November 1, 1920.

ORDER EXTENDING TIME.

[Filed October 29, 1920.]

90 Upon application of the defendant and for good cause shown, the time for making return to the Writ of Error and for filing and allowance of a Bill of Exceptions is extended to December 15, 1920. Peck, J.

PRAECIPE.

[Filed November 26, 1920.]

To the Clerk:

The defendant, Benjamin N. Ford, desires the following matters incorporated into the record:

Indictment.

Motion to Quash Indictment.

Order overruling Motion to Quash Indictment.

Demurrer to Indictment.

Order Overruling Demurrer to Indictment.

Bill of Exceptions and Exhibits.

Motion for a New Trial.

Order Overruling Motion for a New Trial.

Motion in Arrest of Judgment.

Order Overruling Motion in Arrest of Judgment.

Bond.

Petition for Writ of Error and Writ of Error.

Assignment of Errors.

Order allowing Writ of Error.

Citation on Writ of Error.

Order of July 6, 1920, extending time for making return to writ of error and for filing and allowance of bill of exceptions to October 1st.

Order of September 25, 1920, extending time for making return to writ of error and for filing and allowance of bill of exceptions to November 1, 1920.

91 Order of October 29, 1920, extending time for making return to writ of error and for filing and allowance of bill of exceptions to December 15, 1920.

Opinion on Motion to Quash February 26, 1920.

Opinion on Demurrer of May 29, 1920.

Opinion on Motions for New Trial June 23, 1920. Maxwell & Ramsey, Attorneys for Benjamin N. Ford, Defendant. November 26, 1920.

Service of a copy of the foregoing præcipe is hereby acknowledged.
Allen C. Roudebush, Asst. United States Attorney.

EXHIBITS.

GOVERNMENT EXHIBITS.

1. Coal order dated July 31, 1917, No. 5668, The Matthew Addy Co. to Bluefield Coal & Coke Company, 40 cars R. O. M. coal @ \$3.25 per ton, 2,000 pounds f. o. b. mines.

2. Coal order dated July 21, 1917, No. 5667, The Matthew Addy Co. to Bluefield Coal & Coke Company, 40 cars R. O. M., \$3.25 per ton 2,000 pounds f. o. b. mines.

EXHIBIT No 1.

3. Invoice dated November 9, 1917, The Matthew Addy Co. to Boye & Emmes Machine Tool Co. Red Ash Pocahontas lump coal, weight 118,300. Net amount \$207.03.

4. Cancelled check drawn to order of The Matthew Addy Co. by The Boye & Emmes Machine Tool Co. dated December 4, 1917, in amount of \$207.03.

5. Freight bill dated November 19, 1917, covering N. & W. car 85,558, to Boye & Emmes Machine Tool Co., R. O. M. coal, weight 115,300, freight \$73.54, war tax \$2.22, collectible \$76.16.

6. Invoice dated October 1, 1917, The Matthew Addy Co. to Whetstone Coal Co., 1 car Pocahontas R. O. M. coal, weight 85,400, net amount \$149.45.

7. Check (cancelled) drawn to order of Matthew Addy Company by Whetstone Coal Co., dated November 1, 1917, in amount of \$149.45.

8. Acceptance of order, addressed to Whetstone Coal Co. by The Matthew Addy Co. dated September 11, 1917, 1 car grade R. O. M., price \$3.50 per ton of 2,000 pounds f. o. b. cars mines.

9. Invoice dated September 25, 1917, from The Matthew Addy Co. to Rice & Laub. Pocahontas lump coal, weight 99,500, net \$174.13.

10. Memorandum dated September 8, 1917, 2 R. O. M. \$3.50 mines.

11. Post card notice addressed to Rice & Laub, Batavia, Ohio, dated September 26, 1917, signed by The Matthew Addy Company, 1 car Pocahontas.

12. Invoice dated October 22, 1917, The Matthew Addy Company to Alexander Lumber Co., 1 car Pocahontas R. O. M. coal, net amount \$177.63.

13. Confirmation of order from Alexander Lumber Co. to The Matthew Addy Co., 1 50 ton car genuine No. 3 Pocahontas mine run coal @ \$3.50, billing price \$6.75.
14. Invoice dated October 26, 1917, The Matthew Addy Company to Frank M. Dell, 1 car grade smokeless Red Ash R. O. M. coal, weight 100,300 pounds, net amount \$175.63.
15. Cancelled check drawn to order of The Matthew Addy Company by Frank M. Dell, dated November 9, 1917, in amount of \$175.53.
- 93 16. Acceptance of order, dated September 17, 1917, from The Matthew Addy Company to Frank M. Dell, 2 cars grade R. O. M., price \$3.50 per ton 2,000 pounds, f. o. b. cars mines.
17. Acceptance of order, dated September 24, 1917, from The Matthew Addy Co. to D. G. McFadden Grain Co., 1 car grade R. O. M., price \$3.50 per ton of 2,000 pounds, f. o. b. mines.
18. Invoice dated October 22, 1917, from The Matthew Addy Co. to Kraft & Company, 1 car Pocahontas R. O. M. coal, weight 105,000 f. o. b. mines, price \$3.50, net amount \$183.75.
19. Invoice dated October 24, 1917, from The Matthew Addy Co. to Kraft & Co., 1 car Pocahontas R. O. M. coal, weight 101,200, f. o. b. mines, price \$3.50, net amount \$177.10.
20. Acceptance of order, dated September 11, 1917, The Matthew Addy Co. to Frey Bros., 4 cars grade R. O. M., price \$3.50 per ton 2,000 pounds, f. o. b. mines.
21. Invoice dated November 13, 1917, from The Matthew Addy Co. to Frey Bros., 1 car Pocahontas R. O. M. coal, weight 100,000 f. o. b. mines, price \$3.50, net amount \$175.
22. Invoice dated November 8, 1917, from The Matthew Addy Co. to Frey Bros., 1 car Pocahontas R. O. M. coal, weight 102,500 f. o. b. mines, price \$3.50, net amount \$179.38.
23. Invoice dated October 25, 1917, from The Matthew Addy Co. to Frey Bros., 1 car Pocahontas R. O. M. coal, weight 84,700 f. o. b. mines, price \$3.50, net amount \$148.23.
24. Invoice dated October 8, 1917, from The Matthew Addy Co. to Frey Bros., 1 car Pocahontas R. O. M. coal, weight 84,700 f. o. b. mines, price \$3.50, net amount \$148.23.
26. Cancelled check drawn to order of The Matthew Addy Co. by Frey Bros., dated December 3, 1917, in amount of \$324.28.
- 94 27. Freight bill dated October 29, 1917, covering N. & W. Car 53,572, addressed to Frey Bros. Co. by P. C. C. & St. L. R. R. Co., weight 100,000 pounds, \$115.25.
28. Freight bill, P. C. C. & St. L. R. R. Co., to Frey Bros., covering N. & W. Car 53,572, dated October 28, 1917, 100,000 pounds, \$10.06.
29. Freight Bill, P. C. C. & St. L. R. R. Co. to Frey Bros., covering N. & W. Car 47,919, dated November 5, 1917, weight 84,700, total \$93.17.
30. Freight bill, P. C. C. & St. L. R. R. Co. to Frey Bros., dated November 4, 1917, covering N. & W. Car 47,919, weight 84,700, amount \$2.18.

31. Freight bill, P. C. C. & St. L. R. R. Co. to Frey Bros., dated November 19, 1917, covering N. & W. Car 74,444, weight 102,500, amount \$116.13.
32. Freight bill, P. C. C. & St. L. R. R. Co. to Frey Bros., dated November 19, 1917, covering N. & W. Car 74,444, 102,500 pounds, amount \$2.64.
33. Freight bill, P. C. C. & St. L. R. R. Co. to Frey Bros., dated November 26, 1917, covering N. & W. Car 73,367, 120,000 pounds, amount \$113.30.
334. Freight bill, P. C. C. & St. L. R. R. Co. to Frey Bros., dated November 27, 1917, covering N. & W. Car 73,367, 100,000 pounds, amount \$2.58.
35. Invoice dated November 12, 1917, from The Matthew Addy Co. to F. R. Kluckhohn, 1 car Pocahontas R. O. M. coal, weight 55,400, price \$3.50 mines, net amount \$149.45.
36. Invoice dated October 6, 1917, from The Matthew Addy Co. to F. R. Kluckhohn, 1 car Pocahontas R. O. M. coal, weight 99,700, price \$3.50 mines, \$174.40.
37. Acceptance of order, dated September 8, 1917, from The Matthew Addy Co. to F. R. Kluckhohn, 2 cars grade R. O. M., price \$3.50 per ton f. o. b. cars mines.
38. Cancelled check drawn to order of The Matthew Addy Co., signed by F. J. Kozlowski, dated October 9, 1917, in amount of \$154.70.
39. Invoice dated September 10, 1917, from The Matthew Addy Co. to West Pullman Fuel Co., 1 car Pocahontas R. O. M. coal, weight 88,400, price \$3.50 mines, net amount \$154.70.
40. Invoice dated November 16, 1917, from The Matthew Addy Co. to South End Supply Co., 1 car Pocahontas R. O. M. coal, weight 101,400, price \$3.50 mines, net amount \$177.45.
41. Invoice dated November 12, 1917, from The Matthew Addy Co. to South End Supply Co., 1 car Pocahontas R. O. M. coal, weight 108,800, price \$3.50 mines, net amount \$190.40.

DEFENDANT'S EXHIBITS.

- A. Letter, The Alexander Lumber Co. to A. J. Devlin, dated Chicago, October 18, 1919.
- B. (For identification only) Copy of Lane-Peabody Agreement.
- C. (For identification only) Statement entitled: "The Matthew Addy Company Analysis Cost of Coal Sales January 1, 1917, to March 31, 1920."

70 Letter, Alexander Lumber Co. to A. J. Devlin.

96 DEFENDANT'S EXHIBIT "A."

(The Alexander Lumber Co.)

Chicago, Oct. 18th, 1919.

A. J. Devlin, Special Agt., Department of Justice, Bureau of Investigation, P. O. Box 766, Cincinnati, O.

DEAR SIR: Replying to your favor October 16th, the writer I. K. McClatchie handled the transaction referred to in our letters of October 15th and 18th with the Chicago office of Matthew Addy Co. Yours truly, The Alexander Lumber Co. I. K. McClatchie.

DEFENDANT'S EXHIBIT "B."

(For Identification.)

Department of the Interior, Office of the Secretary.

June 28, 1917.

Memorandum for the Press.

The following papers show what has been done through the co-operation of the coal operators in the matter of reasonable coal prices.

June 28, 1917.

DEAR MR. PEABODY: I feel that the present extremely high prices on coal require immediate action by the coal operators, and therefore would urge upon you that they should be reduced at once and maximum prices fixed which would apply to sales on and after July 1, 1917, and continue until such time as the investigation which you propose into costs and conditions shall warrant a reduction or increase. These prices should not be used to affect present contracts or apply to export or foreign trade. In other words the people of the United States should have, as I urged upon the operators the other day, immediate relief and knowledge of their disposition to make a reasonable price irrespective of the possibilities of obtaining higher prices. This would be regarded by the people as meeting the situation promptly and wisely if the prices materially cut those which exist. Cordially yours, Franklin K. Lane.

Mr. F. S. Peabody, Chairman, Committee on Coal Production, Council of National Defense.

Whereas under the Act of Congress approved August 29, 1916, providing that a Council of National Defense be established "for the co-operation of the industries and resources for the national security and welfare, to consist of the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Labor," authority

is given to the Council to organize subordinate bodies for its assistance and co-operation, and

Whereas, pursuant to this authority the Council of National Defense has appointed Mr. Francis S. Peabody, Chairman of and with authority to appoint a Committee on Coal Production, representative of the coal producing districts of the United States, and,

Whereas a great national emergency now exists in the fuel supply of the nation, and as the coal operators and miners of the United States desire to co-operate as closely as possible with the Government, and as the Department of the Interior, the Federal Trade Commission, and the Committee on Coal Production have given close and intelligent study to the necessities now existing.

Therefore Be It Resolved, That it is the sense of this meeting that a committee of seven for each coal producing state and an additional committee of seven appointed by the representatives of the anthracite industry be appointed by the representatives of the
98 each state now attending this convention, to confer with the Secretary of the Interior, the Federal Trade Commission, and the Committee on Coal Production of the Council of National Defense, to the end that production be stimulated and plans be perfected to provide adequate means of distribution, and, further, that these committees report forthwith to the Secretary of the Interior, the Federal Trade Commission, and the Committee on Coal Production of the Council of National Defense costs of and conditions surrounding the production and distribution of coal in each district, and that these committees are authorized, in their discretion, to give assent to such maximum prices for coal f. o. b. cars at mines in the various districts as may be named by the Secretary of the Interior, the Federal Trade Commission, and the Committee on Coal Production of the Council of National Defense.

Adopted June 28, 1917.

This Convention by resolution heretofore adopted having requested the Secretary of the Interior, the Federal Trade Commission and the Committee on Coal Production to fix a fair and reasonable price at which the several operators in the several coal districts of the United States shall sell coal; do hereby further authorize said government representatives, so named in said resolution, to forthwith issue a statement fixing a tentative maximum price which, in their judgment, is fair and reasonable as applied to the several coal districts, at which coal shall be sold from and after the first day of July next and until the accurate costs have been ascertained and a fair and reasonable price based thereon fixed by said government agencies designated under said resolution.

To this end therefore be it resolved that the several states, here represented, do present to the chairman of this Convention a suggestion, for use by said agencies in fixing the price which the several interests here represented feel should be the fair and reasonable price to be so tentatively fixed by the said agencies.

Adopted June 28, 1917.

70 Letter, Alexander Lumber Co. to A. J. Devlin.

96 DEFENDANT'S EXHIBIT "A."
(The Alexander Lumber Co.)

Chicago, Oct. 18th, 1917.

A. J. Devlin, Special Agt., Department of Justice, Bureau of Investigation, P. O. Box 766, Cincinnati, O.

DEAR SIR: Replying to your favor October 16th, the writer I. K. McClatchie handled the transaction referred to in our letters of October 15th and 18th with the Chicago office of Matthew Addy Co. Yours truly, The Alexander Lumber Co. I. K. McClatchie.

DEFENDANT'S EXHIBIT "B."

(For Identification.)

Department of the Interior, Office of the Secretary.

June 28, 1917.

Memorandum for the Press.

The following papers show what has been done through the co-operation of the coal operators in the matter of reasonable coal prices.

June 28, 1917.

DEAR MR. PEABODY: I feel that the present extremely high prices on coal require immediate action by the coal operators, and therefore would urge upon you that they should be reduced at once and maximum prices fixed which would apply to sales on and after July 1, 1917, and continue until such time as the investigation which you propose into costs and conditions shall warrant a reduction or increase. These prices should not be used to affect present contracts or apply to export or foreign trade. In other words the people of the United States should have, as I urged upon the operators the other day, immediate relief and knowledge of their disposition to make a reasonable price irrespective of the possibilities of obtaining higher prices. This would be regarded by the people as meeting the situation promptly and wisely if the prices materially cut those which exist. Cordially yours, Franklin K. Lane.

Mr. F. S. Peabody, Chairman, Committee on Coal Production, Council of National Defense.

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is given to the Council to organize subordinate bodies for its assistance and co-operation, and

Whereas, pursuant to this authority the Council of National Defense has appointed Mr. Francis S. Peabody, Chairman of and with authority to appoint a Committee on Coal Production, representative of the coal producing districts of the United States, and,

Whereas a great national emergency now exists in the fuel supply of the nation, and as the coal operators and miners of the United States desire to co-operate as closely as possible with the Government, and as the Department of the Interior, the Federal Trade Commission, and the Committee on Coal Production have given close and intelligent study to the necessities now existing.

Therefore Be It Resolved, That it is the sense of this meeting that a committee of seven for each coal producing state and an additional committee of seven appointed by the representatives of the anthracite industry be appointed by the representatives of each state now attending this convention, to confer with the Secretary of the Interior, the Federal Trade Commission, and the Committee on Coal Production of the Council of National Defense, to the end that production be stimulated and plans be perfected to provide adequate means of distribution, and, further, that these committees report forthwith to the Secretary of the Interior, the Federal Trade Commission, and the Committee on Coal Production of the Council of National Defense costs of and conditions surrounding the production and distribution of coal in each district, and that these committees are authorized, in their discretion, to give assent to such maximum prices for coal f. o. b. cars at mines in the various districts as may be named by the Secretary of the Interior, the Federal Trade Commission, and the Committee on Coal Production of the Council of National Defense.

Adopted June 28, 1917.

This Convention by resolution heretofore adopted having requested the Secretary of the Interior, the Federal Trade Commission and the Committee on Coal Production to fix a fair and reasonable price at which the several operators in the several coal districts of the United States shall sell coal; do hereby further authorize said government representatives, so named in said resolution, to forthwith issue a statement fixing a tentative maximum price which, in their judgment, is fair and reasonable as applied to the several coal districts, at which coal shall be sold from and after the first day of July next and until the accurate costs have been ascertained and a fair and reasonable price based thereon fixed by said government agencies designated under said resolution.

To this end therefore be it resolved that the several states, here represented, do present to the chairman of this Convention a suggestion, for use by said agencies in fixing the price which the several interests here represented feel should be the fair and reasonable price to be so tentatively fixed by the said agencies.

Adopted June 28, 1917.

June 28, 1917.

MY DEAR MR. PEABODY: I have just learned of the action of the coal operators, and I wish to express my appreciation of the generous, prompt and patriotic manner in which they have acted. They have dealt with the situation in the way that I had hoped they would, as large men dealing with a large question. They manifestly see that this is no time in which to consider primarily the opportunities which the war gives for personal aggrandizement. We must gain for each by gaining for all. The Country is in a mood for sacrifice. It is intent upon the success of the war and is willing to do everything needed to give insurance to the world against a repetition of this awful condition.

Will you not be good enough to express to the coal men my appreciation of the spirit they have shown in determining that their prices shall be reduced so that the industries of the country may not feel hampered, and the people may not feel that their spirit is broken down by the thought that this is to be a war for individual advantage instead of self-protection. I felt from the moment of my talk to them that no body of men more truly represented the high purpose to yield personal desire for general good than did they. Now I trust that we shall immediately put into concrete form the spirit of your resolution. Cordially yours, Franklin K. Lane.

Hon. F. S. Peabody, Chairman Committee on Coal Production,
Council of National Defense.

Memorandum for the Press.

Department of the Interior, Office of the Secretary.

June 28, 1917.

As a result of the conference between the mine operators, the Secretary of the Interior, Federal Trade Commissioner Fort, Chairman Peabody and the committee on coal production of the Council of National Defense, the following reductions were made to go into effect July 1 next in the prices of coal. This according to the statement of Director George Otis Smith of the Geological Survey of the Interior Department will effect a reduction to the consumers east of the Mississippi River of fifteen million dollars a month, based on the output of free coal in May of this year. These prices are maximum prices per ton of 2,000 pounds aboard the cars at mine, pending further investigation. These prices do not affect in any way contracts in existence or sales of coal for foreign or export trade.

The operators tendered to the government a reduction from these reduced prices of fifty cents per ton for coal that the government may need.

No action was taken upon anthracite prices because of the fact that these prices had already been acted upon by the Federal Trade Commission.

Twenty-five cents per net ton was fixed as the maximum price for coal jobbers' commission with only one commission, no matter how many jobbers' hands the coal may pass through.

On account of an inadequate representation of operators west of the Mississippi River, no maximum prices were fixed for coal from those districts. A supplementary statement will be issued within a few days covering prices on coal produced in those districts.

The action taken at their conference, brings about the following results:

Present prices on bituminous coal mined in Pennsylvania have ranged from \$4.75 to \$6.00. Under the ruling the price is reduced to \$3.00 for mine run and \$3.50 for domestic lump, egg and nut.

The present range of prices in West Virginia is from \$4.50 to \$6.00; price reduced to \$3.00 for mine run and \$3.50 for domestic lump, egg and nut.

The range of prices for Ohio coal has been from \$4.50 to \$5.00; prices reduced to: No. 8 district, the thick vein Hocking and Cambridge districts, \$3.00 for mine run and \$3.50 for domestic lump, egg and nut; thin vein Hocking, Pomeroy, Crooksville, Coshocton, Columbiana County, Tuscarawas County, Amsterdam-Bergholz District, \$3.25 for mine run and \$3.50 for domestic lump, egg and nut; the Massillon and Palmyra districts and Jackson County, \$3.50 for all grades of coal.

The prevailing prices in Alabama have been from \$5.50 to \$5.75; prices reduced to: Cahaba and Black Creek, \$4.00; Pratt, Jaeger and Corona, \$3.50; Big Seam, \$3.00 for all grades.

The prevailing prices for coal mined in Maryland have been from \$5.75 to \$6.00; reduced prices will be \$3.00 for mine run and \$3.50 for domestic lump, egg and nut.

The prevailing prices on coal mined in Virginia have been \$4.50 to \$5.00; reduced price, \$3.00 for mine run and \$3.50 for lump, egg and nut.

The prevailing prices on coal mined in Kentucky have been from \$4.00 to \$4.50; reduced price, \$3.00 for mine run and \$3.50 for the domestic sizes.

The prevailing prices on coal mined in Illinois and Indiana have been from \$3.50 to \$4.00; reduced price, \$2.75 for mine run and steam sizes and \$3.50 for screened domestic sizes.

The prevailing prices on coal mined in Tennessee have been from \$4.50 to \$5.00; reduced price, \$3.50 for all sizes.

At the conclusion of the conference Secretary Lane said:

GENTLEMEN: This is a very novel proceeding. I think I am within the fact when I say that no such hearing or gathering as this has ever been held in the United States before, or perhaps in the world. You are, I hope, pioneers in a good movement. I come from the land of pioneers, the far Western country, where we look back with respect and admiration and some reverence upon those who crossed the hard and stony and waterless places to the richer spots beyond. And I hope that you will be looked back upon not only by

those who succeed you in the coal business, but by the industries of the United States, with respect and admiration for the manner in which you have acted at this conference. You have responded to a call made upon you in the name of the people of the United States. You are not a removed class. You are of us. You belong to the people. Most of you are men who were not born to wealth. You came up out of the soil like the rest of us and you have shown a sympathy and an understanding of your relations with the people from which you spring. That is the essential quality in democracy. Unless we can maintain in our minds always a consciousness of the source of power in this country, democracy is a failure. There is a strong contention made that this government can not so organize itself as to meet to the full the demands 102 that are and are to be made upon it, that other forms of government in times of stress or, in fact, in any times, are more competent and more efficient, because there is the strong hand of the government above, threatening, menacing, compelling. If we in the United States are to work out problem economic, social, as we have worked out our problem political, we must work it out in my judgment in the spirit in which you have worked—with sympathy, with recognition of those whom you serve. There is a kind of corporation in this country that we know as a public utility. A public utility is one that is at the service of anyone and must render him the kind of service that it holds out to give. In the biggest and broadest sense, each one of you in running a coal mine is managing a public utility, because the public is dependent upon you. And this world is going forward and not backward, it is going to keep its confidence in democracy, if the men who have the management of industry and the men who give direction to the thought of the country have in their hearts always the welfare of the people. The one thing that will turn us back is the exercise of arbitrary power by those who have power and who exercise it ruthlessly. You have been up against an extremely odd situation. And now you have gathered here and met that situation in man fashion. I think you have reason to be proud of what you have done. Speaking for Governor Fort and for Mr. Peabody and his Committee and for myself, we are proud of what you have done. You have said to the American people that within your power, exercising your judgment, protecting yourselves, you will not be oblivious to the rights of those whom you serve; you will, within your power, protect them. That is the spirit that makes for the success of our country. And if all the industries of the United States will have that same spirit, there will be no question as to our ability to mobilize the resources of this country and carry this war to a successful conclusion. Good sense, common sense, vision, the judgment of large-minded men—those are the things that must characterize us if we are to carry on this great venture. We must not work singly and alone, for selfish ends, in the hope of reaping rich rewards which will distinguish us merely as men who are in industry as makers of money. We must work as the men that the papers said landed in Europe yesterday will work. We must work in companies

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103 & 104 in bat-allions, in regiments, and we must have in our minds the purpose that we are going to march forward to victory, victory not for ourselves but victory for the country that is dearer to us than anything we have except our own families. This war is not a war of a day. It is not a war upon which we entered lightly. It is not a war in which any man, no matter how old he is, no matter what his resources may be, will not be compelled to play his part. We are the greatest business nation on earth, and therefore we must look to the business men of the country to lead our people in spirit. And I think that the word that comes out from this gathering will be an inspiration to the people of the country.

The Matthew Addy Company Analysis Cost of Coal Sales, January 11, 1917, to March 31, 1920.

Letter-head of Frank C. Dekebach, Certified Public Accountant, Traction Building, Cincinnati.

May 17, 1920.

To the President and Directors of the Matthew Addy Co., Cincinnati, Ohio.

GENTLEMEN: This is to certify that we have made an examination of the cost of coal sales of your company for the period, January 1, 1917, to March 31, 1920, and that the data contained in the attached schedules, in our opinion, correctly set forth the monthly costs for the period covered. Respectfully submitted, Frank C. Dekebach, Certified Public Accountant.

(Here follows statement of tonnage, marked pages 105-110.)

113 & 114

CERTIFICATE OF CLERK.

UNITED STATES

vs.

BENJAMIN N. FORD.

I, B. E. Dilley, Clerk of the District Court of the United States for the Southern District of Ohio, do hereby certify that the foregoing pages, numbered 1 to 112 inclusive, contain a true and correct copy of those portions of the record and proceedings indicated in the præcipe for record, filed November 26, 1920 (found on page 90 hereof) as the same appear of record and on file in the office of the clerk of said court in the above entitled cause.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the city of Cincinnati, Ohio, this 15th day of December, 1920. B. E. Dilley, Clerk, by Harry F. Rabe, Deputy. (Seal.)

Proceedings in the United States Circuit Court of Appeals for the Sixth Circuit.

APPEARANCE OF COUNSEL.

[Filed Dec. 22, 1920.]

Arthur B. Mussman, Clerk of said Court:

Please enter my appearance as counsel for the Plaintiff in Error. Nelson B. Cramer.

STIPULATION FOR ADDITION TO RECORD.

[Filed Dec. 22, 1920.]

It is hereby agreed and stipulated between the parties that additional page No. 28a containing transcript of verdict and the sentence herein may be inserted in the printed record heretofore filed. R. T. Dickerson, Asst. U. S. Atty. Maxwell & Ramsey, for Plaintiff in Error.

115

JUDGMENT.

[Filed May 4, 1922.]

Error to the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Opinion (Filed May 4, 1922).

ORDER APPROVING STIPULATION.

[Filed Jan. 6, 1921.]

Ordered that the stipulation of the parties for inserting in the printed record an additional page No. 28a be and is approved.

CAUSE ARGUED IN PART.

(March 7, 1922—Before Knappen, Denison, and Donahue, C. JJ.)

These causes are argued together by Mr. Joseph S. Graydon for the plaintiffs in error and are continued until tomorrow for further argument.

FURTHER ARGUED AND SUBMITTED.

[March 8, 1922.]

These causes are further argued by Mr. Joseph S. Graydon and Mr. Julius R. Samuels for the plaintiffs in error and by Mr. Thomas H. Morrow, Assistant United States Attorney, for the defendant in error and are submitted to the Court.

[Title omitted.]

OPINION.

[Filed May 4, 1922.]

Submitted March 8, 1922. Decided May 4, 1922.

Before Knappen, Denison, and Donahue, Circuit Judges.

KNAPPEN, Circuit Judge: The Lever Act was approved and took effect August 10, 1917, (40 Stat., Ch. 53, p. 276). Its title declares it "an act to provide further for the national security and defense by encouraging the production, conserving the supply and controlling the distribution of food products and fuel." By Sec. 25 the President of the United States was authorized and empowered "whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation

118 of and to regulate the method of production, sale, shipment, distribution, apportionment and storage thereof among dealers and consumers, domestic or foreign," etc. Subdivision 17 of that section penalizes the violation of or refusal to conform to the regulations provided for in the section, with knowledge that they have been so prescribed. On August 23, 1917, the President adopted a series of regulations as to prices and margins to be in force "pending further investigation or determination thereof by the President." The first of these regulations defined a coal jobber as a person (or other agency) "who purchases and resells coal to coal dealers or to consumers without physically handling it on, over, on through his own vehicle, dock, trestle or yard." Regulation No. 2 forbids a jobber, for the buying and selling of bituminous coal, to add to his purchase price a gross margin in excess of 15 cents per ton. Paragraph 16 of Sec. 25 provides that the maximum price fixed and published (by the Trade Commission) shall not be construed as invalidating any contract in which prices are fixed, made in good faith, prior to the establishment and publication of maximum prices by the Commission; and on October 6, 1917, the fuel administrator made a regulation that bona fide contracts relating to bituminous coal made before the President's proclamation of August 21, 1917, should not be affected "by these proclamations."

It is conceded or established by verdict that the Matthew Addy Company was, at the time of the transactions complained of, a corporation conducting at Cincinnati, Ohio, the business of a coal jobber, as defined in the President's regulation; that Benjamin N. Ford was vice-president, and in such capacity had control and direction of the activities and contracts of the Matthew Addy Company, so far as they related to the conduct of the business as a coal jobber, and that each plaintiff in error knew of the regulation fixing the "gross margin" at 15 cents per ton. The corporation (cause No. 3517) and Ford (No. 3516) were separately indicted for making, subsequent to August 23, 1917, various specific sales of coal at a price which "included a profit or gross margin" to the corporation of 25 cents per ton, the corporation having no contract with the purchaser made in good faith prior to August 23, 1917, and with knowledge on the part of the respective defendants that such "profit or gross margin of 25 cents per ton" was in excess of the "profit or gross margin of 15 cents per ton" permitted, by the executive order and regulations referred to, to be added to the purchase price paid by the jobber. The corporation was convicted upon 13 counts of the indictment against it;

119 Ford was convicted upon 7 counts of the indictment against him. In the case of each count in each indictment on which conviction was had it was either admitted or established that the sales were made at a gross margin of 25 cents in excess of the purchase price to the jobber; and that on August 23, 1917, the corporation had no contract for the sales in question. It appeared, however, that all the coal covered by the various counts had been purchased by the corporation previous to August 10, 1917, when the Lever Act took effect. The two cases were tried together, and were

argued together in this court. In each the questions presented for review are the same.

1. Plaintiffs in error contend that inasmuch as the coal in question was bought prior to the President's order of August 23rd and the passage of the Lever Act (August 10th), and as the executive order allowed a margin of 15 cents per ton for the combined "buying and selling of bituminous coal," the penal provisions of Sec. 15 do not apply; that on August 21st the President had provisionally fixed prices of coal both at the mines and in the hands of middlemen and retailers, based upon the cost of production, and regarded as not only just fair and liberal; that the buying and selling amounted to a single transaction, and that to so construe the act as to cover a purchase previous to the executive order and the act would be contrary to the intent of the regulations, and would in given cases attribute to the President an intention to limit the jobber to a gross margin which might well be less than the expense incurred by him in the purchase thereof. This conclusion is thought to be confirmed by certain rulings in the fuel administrator's order of October 6, 1917, which are thought to indicate that it was not at that subsequent date considered an offense for a jobber who had purchased coal prior to August 23rd to sell it at any price obtainable. Plaintiffs in error invoke the proposition that penal laws are to be strictly construed, and should not be regarded retroactive unless such intention is clear.

It seems plain that the President's order of August 23rd should not be construed as excluding from its operation coal previously bought. Neither the statute nor the regulations were ordinary legislation. That they were designed to meet a real emergency is shown not only by the title of the act, but by the preamble, which asserts that the measures provided thereby for conserving the supply of food products, fuel, etc., the establishment of Government control and the issue of regulations and orders provided for, were by reason of the existence of a state of war essential to the national security and defense, for the successful prosecution of the war, and for
120 the maintenance of the army and navy. The act was in terms made effective only until the end of the then existing war. Even ordinary remedial laws, although penal, are not to be so strictly construed as to defeat the obvious legislative intent. *Johnson v. So. Pacific R. R. Co.*, 196 U. S. 1, 17-18. We think the sole enquiry in this connection relates to the intent of the executive in making the order of August 23rd. The order must, we think, be construed as applying to all sales made subsequent to the order, regardless of the time the purchases were made. No limitation in this respect was placed by the statute upon executive action. The authority given was to fix prices of coal wherever and whenever sold. The order of August 21st followed but 10 days after the passage of the statute. It stated that it should be in force pending further investigation. As stated by the trial judge, it was matter of public knowledge, and recognized in certain orders of the fuel administration, that the coal mine output was largely contracted to be sold in advance; that the supply of coal was to a large extent, and in a proper sense, in the hands of jobbers, when the act was passed, and that

unless jobbers' margins with reference to then existing contracts of purchase were regulated it remained open to jobbers to demand what they could get for their coal, and thus carry on the injurious manipulation and private control of the supply which the act was designed to prevent. We have no difficulty in agreeing with the trial judge that the President's orders in question make clear an intention to control and prevent speculation in fuel so far as possible, and not to permit jobbers who already held contracts for mine output to be free from restriction in the disposition of the same.

2. Plaintiffs in error complain that they were not allowed to show that 15 cents per ton added as commission or gross margin to its purchase price results in this case to loss or inadequate compensation. Denial is made of the President's authority to so limit the gross margin as to accomplish that result. In this connection there is a suggestion that the President's authority can only be exercised through the Federal Trade Commission, a subject which will later be considered under another heading. It is further urged that even if the immediate emergency justified the President in fixing jobber's prices, he was subject to the limitations imposed by the act upon the Trade Commission, which (under paragraph 14) was required in fixing maximum producers' prices to "allow the cost of production, including the expense of operation, maintenance, depreciation and depletion," plus "a just and reasonable profit;" paragraph 15

121 further providing that "in fixing such prices for dealers, the Commission shall allow the cost of the dealer and shall add thereto a just and reasonable sum for his profit in the transaction." In our opinion this contention overlooks the summary nature of the power which we think was conferred on the President, to meet the emergency by making temporary orders which should, so far as possible, save the immediate situation until the Commission should have time and opportunity, through its slower processes, to make more complete investigation of conditions and remedies. It should be conclusively presumed that the President gave the subject all the investigation and consideration which the emergency permitted. It was thus not open to plaintiffs in error to show that in their specific cases the margin allowed was inadequate or resulted in loss.

3. By motion to quash the indictment it is urged that by the Lever Act the President was given no power to fix prices at which coal could be sold, but that such power rested solely in the Trade Commission. Following the broad powers given the President by paragraph 1 of Sec. 25, as quoted in part at the beginning of this opinion, is this express provision: "Said authority and power *may* be exercised by him in each case through the agency of the Federal Trade Commission during the war, or for such part of said time as in his judgment may be necessary."

Plaintiffs in error contend that the word "may" must be construed as "shall," and that this is shown by the asserted "startling innova-

¹Italics ours.

tion in legislative action," due to the exigencies of the war, found in the authority given the President to fix prices of coal and coke and to establish rules and regulations, etc., as contained in the earlier part of the act, as well as in the provisions relating to compensation for the use of plants and businesses requisitioned, to the designation by the President of an agency to which the producers shall sell their products, etc., to procedure by the Trade Commission in enquiring into the cost of producing coal and coke, and in the requirement that the Commission, in fixing maximum prices, shall allow the cost of production or service and add thereto a just and reasonable sum for the profit in the transaction.

We are unable to agree with this contention. The district judge in a brief but comprehensive opinion (263 Fed. 451), held that the word "may" is merely permissive; that the President was by the first paragraph of the section empowered, not required, to exercise his authority through the Commission in each instance; and that such intention was otherwise clear from the context. In this opinion we fully concur.

122 Nor do we think there was error in refusing defendants request to charge that defendants were not liable unless the 25 cents per ton, added by them to the purchase price of \$3.25 per ton, included a profit (after the deduction of all costs and expenses) in excess of 15 cents per ton, and in charging that "profit" means the same as "gross margin," viz.: the difference between the purchase price and the selling price.

4. The constitutionality of Sec. 25 of the act is vigorously assailed on several grounds, the first being that it deprives plaintiffs in error of their property without due process of law. The specific criticisms are that the law is not clear and definite, and that no notice and hearing upon the making of executive orders is provided for. The first criticism is plainly without merit. Nothing could well be more clear and definite than the plain inhibition against making the selling price more than 15 cents per ton higher than the purchase price. The case is obviously not within the reasoning of the Cohen case (255 U. S. 81, 89), which held Sec. 4 of the act invalid; and the instant case is not affected by that decision. As to the second criticism. While under ordinary conditions notice and hearing would be conditions precedent to the making of an order of this kind, we agree with the court below (265 Fed. 424) that due process of law is not to be tested by form of procedure merely, that public danger warrants the substitution of executive processes for judicial process (Mayer v. Peabody, 212 U. S. 78, 84); and that under the war conditions then existing, and as indicated by the preamble of the act, the fixing of prices in industries so vital to the prosecution of the war as food and fuel was not the deprivation of due process of law, but is within the power given to Congress by Art. I, Sec. 8 of the Constitution, to make all laws necessary and proper for carrying into execution the war powers expressly enumerated. Our conclusion that Sec. 25 of the Lever Act is valid is confirmed by the many recent decisions of the Supreme Court sustaining the exercise of war powers; as in the McKinley case (249 U. S. 397, 398), where was sustained a regula-

tion of the Secretary of War, made under the authority of Congress, forbidding the keeping of houses of ill fame within a certain distance of military camps; the War Time Prohibition case (251 U. S. 146, 160), holding that the exercise of the power to prohibit the liquor traffic as a means of increasing war efficiency was within the war power of Congress; Ruppert v. Caffey (251 U. S. 264, 279, 283, 301), which sustained the prohibition against liquors containing one-half of one per cent. of alcohol, even though not in fact intoxicating; the Selective Draft cases (245 U. S. 366, 377); the Espionage cases (Schenck v. U. S., 249 U. S. 47; Frohwerk v. United States, 249 U. S. 204; Debs v. United States, 249 U. S. 211). In several of the cases cited the Lever Act is referred to, and, to say the least, without apparent question of its validity generally.

The section is further criticized as violating Arts. I, II and III of the Federal Constitution, by attempting to delegate legislative and judicial powers to the President, the fuel administrator and the Federal Trade Commission. We are unable to recognize any delegation of judicial power. In our opinion the delegation of power to make reasonable rules and regulations for the control of the food and fuel supply did not violate the prohibition against delegation of legislative power. *Buttfield v. Stranahan*, 192 U. S. 470, 494; *Union Bridge Co. v. United States*, 204 U. S. 364, 377; *St. Louis, Etc., Ry. Co. v. Taylor*, 210 U. S. 281; *McKinley v. United States*, supra.

We see no merit in the suggestion that the section is an abuse of the powers given Congress to provide for the national security and defense, or in the contention that the section violates the 10th amendment by interfering with the rights of the respective states as to regulation of industries within the states.

We have not discussed all the arguments adduced by counsel for plaintiffs in error in support of their contentions. We have, however, given them full consideration, and have reached the conclusion that no error was committed by the court below in the respects complained of, and that its judgment should be affirmed.

124 United States Circuit Court of Appeals for the Sixth Circuit.

I, Arthur B. Mussman, of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of Benjamin N. Ford vs. United States of America, No. 3516, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 29th day of May, A. D. 1922. Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit. [Seal of the United States Circuit Court of Appeals, Sixth Circuit.]

125 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Benjamin N. Ford is plaintiff in error, and The United States of America is defendant in error, No. 3516, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of Ohio, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the

said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two. Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

United States Circuit Court of Appeals for the Sixth Circuit, ss.

I, Arthur B. Mussman, clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of the record of the proceedings of this court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the sixth day of November, A. D. 1922 there was filed in my office a stipulation in the above entitled case in the following words, to wit:

United States Circuit Court of Appeals for the Sixth Circuit, ss.

BENJAMIN N. FORD, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

It is hereby stipulated by and between counsel for plaintiff in error and defendant in error that the transcript of the record of this Court in the above entitled cause, filed in the Supreme Court of the United States with a petition for writ of certiorari may be considered as a return by the clerk of this Court to the writ of certiorari issued

out of the Supreme Court of the United States on the 26th day of October 1922, directing this Court to certify to said Court the record and proceedings herein. Benjamin N. Ford, by Julius R. Samuels, Counsel. United States of America, by Jas. M. Beck, per Thos. H. Morrow, Counsel.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof. Witness my official seal, signature and the seal of said Circuit Court of Appeals at the city of Cincinnati, Ohio, in said circuit this sixth day of November, A. D. 1922. Arthur B. Mussman, Clerk United States Circuit Court of Appeals for the Sixth Circuit. [Seal of the United States Circuit Court of Appeals, Sixth Circuit.]

127 [Endorsed:] File No. 29,045. Supreme Court of the United States, October Term, 1922. No. 495. Benjamin N. Ford vs. The United States of America. Writ of Certiorari. Filed Nov. 6, 1922. Arthur B. Mussman, Clerk.

[Endorsed:] File No. 29,045. Supreme Court U. S., October Term, 1922. Term No. 495. Benjamin N. Ford, Petitioner, vs. The United States. Writ of certiorari and return. Filed Nov. 9, 1922.

John Marshall

Attorney General

The Honorable John Marshall

United States of America

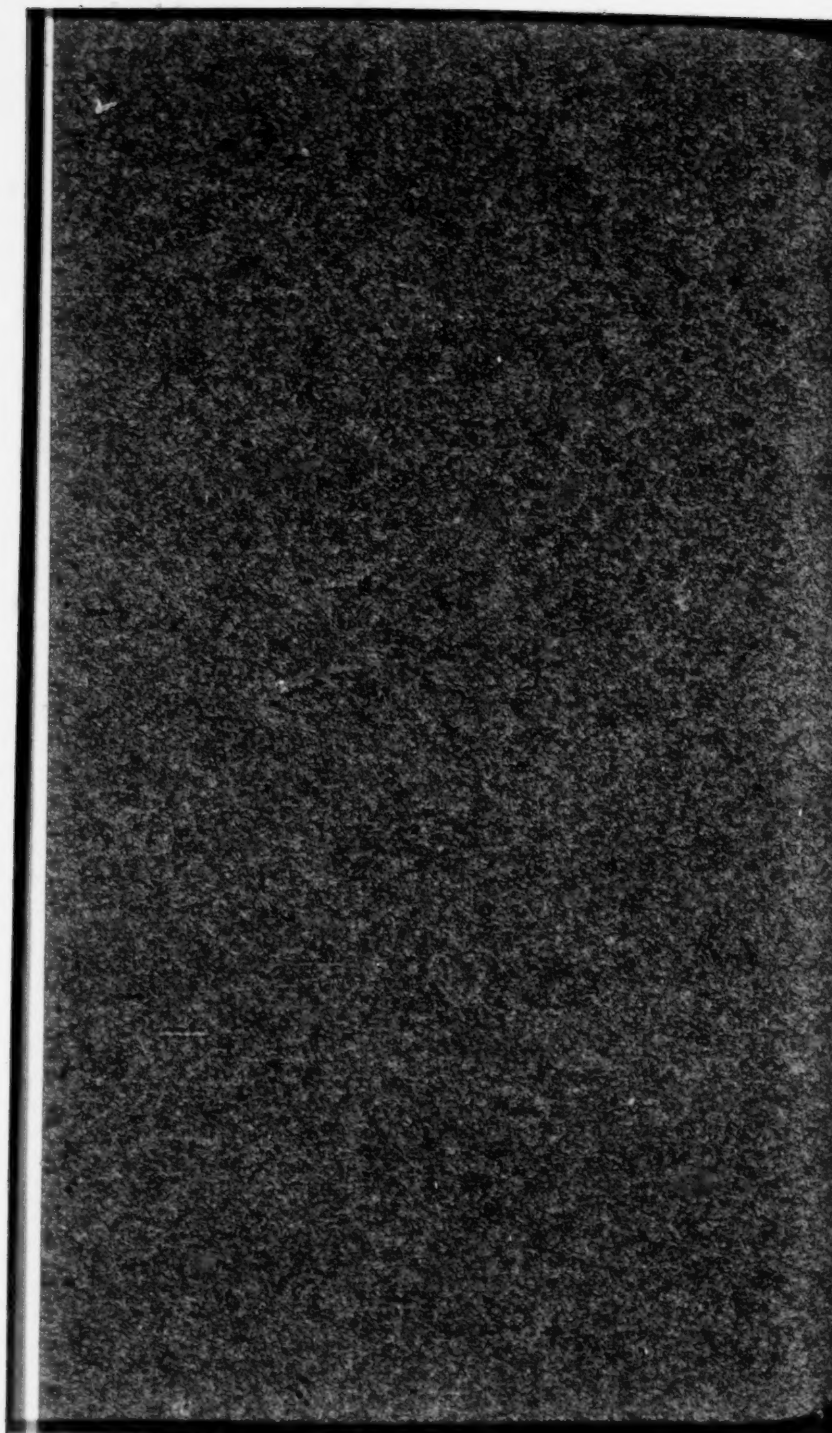
Democrat

United States of America

IN WITNESS WHEREOF, I have hereunto set my hand and the Great Seal of the United States

JOHN MARSHALL

WASHINGTON, D. C.



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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

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| THE MATTHEW ADDY COMPANY, petitioner, v. UNITED STATES OF AMERICA. | } | No. 84. |
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| BENJAMIN FORD, PETITIONER, v. UNITED STATES OF AMERICA. | } | No. 85. |
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*ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SIXTH CIRCUIT.*

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The Congress of the United States, by the Act of August 10, 1917 (40 Stat. 276, 284), commonly known as the "National Defense Act" or the "Lever Act," authorized the President to fix the price of coal and coke wherever and whenever sold either by producer or dealer and to establish rules and regulations for the production, sale, shipment, distribution, apportionment, and storage thereof among dealers and consumers both domestic and foreign. Acting

under this authority, the President, on August 23, 1917, issued an Executive order designed to regulate dealing in coal by middlemen. The first paragraph of this order defines the term "coal jobber" as "a person (or other agency) who purchases and resells coal to coal dealers or to consumers without physically handling it on, over, or through his own vehicle, dock, trestle, or yard." The second paragraph which fixed the margin that might be charged by dealers in bituminous coal was as follows:

For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of 15 cents per ton of 2,000 lbs., nor shall the combined gross margins of any number of jobbers who buy and sell a given shipment or shipments of bituminous coal exceed 15 cents per ton of 2,000 lbs. (General Orders, Regulations, and Rules of the United States Fuel Administration, p. 444.)

The Matthew Addy Company, the petitioner here and the defendant below, was engaged in business as a coal jobber in the city of Cincinnati, Ohio, during the months of September and October of 1917. It was convicted upon a number of counts of an indictment, each of which alleged that subsequent to August 23, 1917, it had made certain specific sales of coal and in each case had added a "profit or gross margin" of 25 cents per ton, which it well knew to be in excess of the "profit or gross margin" allowed by the Executive order and regulations.

A motion to quash the indictment and a demurrer were overruled prior to the trial. (Rec. 21, 23.) The opinions of the court are reported in 263 Fed. 449 and 265 Fed. 424.

The several questions raised by the defendant in the courts below and the contentions urged by its counsel in their brief in this court, will sufficiently appear in the course of the following argument which in its outline adopts the analysis of counsel for the defendant.

The principal issue involved is whether the war power of Congress extends to the fixing of prices which may be charged for "necessaries." This is now of little popular interest, but is of vital concern to the Government. Should the United States, unhappily, become involved in another great war, Congress would immediately turn to the pronouncements of this court to ascertain the scope and extent of its constitutional power. A limitation thereof, marked by a decision in this case adverse to the Government, might well prove more effective for our enemies than an Army Division or a Battle Squadron.

(By a stipulation filed, a single brief is submitted in Nos. 84 and 85. The references herein made to the Record are to the Transcript in No. 84.)

ARGUMENT.

I.

The Executive order of August 23, 1917, applied to sales for which the defendant was indicted.

The President of the United States, acting under the powers conferred upon him by section 25, para-

graph (1), of the National Defense Act (Lever Act, approved August 10, 1917, 40 Stat. 276, 284), issued an Executive order on August 23, 1917, which provided (paragraph (2)):

For the buying and selling of bituminous coal a jobber *shall not add* to his purchase price *a gross margin* in excess of 15¢ per ton of 2,000 pounds * * *. [Italics ours.]

It is here contended that the defendant, which added a margin of 25¢ per ton after August 23, did not violate this order, for the reason that the coal sold was *purchased* by it in the preceding July.

The language of the order is so plain and unambiguous that no extrinsic aids are necessary to its construction. It provides that a jobber "*shall not add*" an excessive margin, and a violation of it occurs when he does add such margin. The margin is added when he makes his sale, and the language of the order clearly applies to all cases where this is done after the date of the order.

Nothing is better settled than that in the construction of a law its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it. (Mr. Justice Day in *United States v. Standard Brewery*, 251 U. S. 210, at 217.)

The defendant, however, contends that because the words "for buying and selling" are used the *buying* is made an element or part of the offense and

the order does not apply unless the coal be *bought* after the date of the order. By this contention it is sought to prove that the order, so applied, would be retroactive and would amount in substance to an *ex post facto* law. The error lies in the assumption that the buying of coal is an element or part of the offense of violating the order. It is merely a circumstance or condition which must exist before a violation of the order can occur. It is not an element of the offense in the sense that it is a step in the violation of the order.

There is a clear distinction between those facts, circumstances, and conditions which must exist before a crime can be committed and those acts which constitute the crime itself. The former are essential elements in the proof of the crime, while the latter are essential elements of the crime itself.

In the instant case the buying of coal was not a part of the offense of violating the order, which by its terms was applicable whenever an excessive margin was *added* by a jobber after August 23, 1917. The order was *retro-spective* in the sense that any similar order is retrospective; but it was not *retro-active* or *ex post facto* in its operation upon the defendant.

It is further contended, however, that notwithstanding the clear language of the order it ought not to be applied to any coal purchased prior to August 23, because such application would be confiscatory and render the order unconstitutional. It is said

that a jobber must expend money in buying as well as in selling and the fixing of a margin of 15¢ per ton would be confiscatory in cases where more than 15¢ had already been spent in the buying alone. The constitutionality of the order will be dealt with in another place. It is sufficient here to point out that the effect is no different from that of the Executive order of August 21, 1917, which fixed the prices of bituminous coal at the mine. On that date the operators may have had on hand coal which had been mined and ready for market but not sold. The cost of producing that coal had been expended. The application of the price-fixing order to that coal might appear to be confiscatory. Yet it would not be seriously urged that the Executive order did not apply to that coal.

The construction of the order contended for would discriminate as against the mine owner and in favor of the jobber * * *. Such a construction would violate the obvious purpose of the act. (Peck, District Judge, Opinion on Motion for New Trial, Rec. 25.)

The effect of the Executive order of August 23 upon coal which the defendant had already purchased is exactly the same as that of the Volstead Act, which became immediately effective upon beer lawfully manufactured and ready for sale at the time of its approval. With respect to this effect, Mr. Justice Brandeis said, in *Ruppert v. Caffey*, 251 U. S. 264, at p. 301:

Hardship resulting from making an act take effect upon its passage is a frequent incident

of permissible legislation; but whether it shall be imposed rests wholly in the discretion of the law-making body.

It is further urged by the defendant that the acts charged in the indictment were not in violation of any order in effect during August and September, when the sales complained of were made, but were within the purview of another order made October 6, 1917. (Paragraph (9) of order of October 6, 1917, printed in petitioner's brief, pp. 84-87.) It is argued that the issuance of this order "shows conclusively that prior to that day it was not considered an offense for a jobber who had purchased coal prior to August 23 to sell the same at any price obtainable in the market." (Brief, p. 15.) A careful reading of that order, however, shows that it does not apply to the case, and that the conclusion drawn from its promulgation is not warranted. The order reads:

A jobber who, at the time of the President's order fixing the price of the coal in question at the mine (August 21, 1923), had contracted to buy coal *at or below the President's price*, and at that time had no contract to sell such coal, shall not sell the same at a price higher than the purchase price plus the proper jobber's commission as determined by the President's regulation of August 23, 1917. [Parentheses and italics ours.]

This order applied only to such jobbers as had contracts under which they would receive coal "at or below the President's price." It was designed to

prevent such jobbers from taking advantage of their favorable contracts and of the President's price by increasing their selling price to the President's price plus 15¢. The defendant had no such contract. Its contract of July 31 was at \$3.25 per ton. (Rec. 39.) The President's price on such coal was \$2.00 per ton. The order of October 6, 1917, did not apply to their contracts, but had quite a different scope and purpose.

If it were necessary, as we believe it is not, to go beyond the four corners of the order to determine its intent and proper application, the conclusion, found in the circumstances existing in August, 1917, is irresistible. The progress of the World War, then in its third year, had demonstrated to everyone that its successful prosecution required not only the development of an effective fighting force in France and upon the seas, but the marshaling of every available agricultural, commercial, and industrial resource of the country. The withdrawal of millions of men from productive enterprise and the unparalleled demands for food and fuel created a situation which threatened disaster unless effectively controlled by the strong arm of governmental regulation. Not only was there a shortage of fuel in the United States but there was a critical scarcity in the supply of our Allies. We were in the midst of one of the most protracted coal strikes in the history of the country, which was not settled until the last days of October. The greater portion of the coal mined and available

for distribution had been sold by the producers and was being held by jobbers.

In this grave emergency, Congress passed the National Defense Act and vested in the President power and authority during the emergency to control the sale and distribution of food and fuel. The President's orders pursuant to this act followed with startling rapidity. In 11 days came the order fixing the price of bituminous coal at the mine. And two days later followed the order fixing the jobbers' margins. Nothing but the compelling force of a great crisis would serve either to explain or justify this celerity. That the crisis existed and that it demanded immediate, certain, definite, and effective action was not then and is not now doubted.

In the distribution of fuel it was imperative that the prices which the jobbers might exact from the public should be regulated, for they controlled the available supply; and it was equally imperative that those prices should relate to all coal then remaining unsold in the jobbers' hands. Otherwise, the tardy effect of the regulatory power would not be manifest until the following year.

Unless jobbers' margins with reference to then-existing contracts were regulated, it remained open to the jobber to demand what he could get for his coal, and to thus carry on the injurious speculation, manipulation, and private control of the supply which the act was designed to prevent. (Peck, District Judge, on Motion for a New Trial, Rec. 25,

and Knappen, Circuit Judge, on Writ of Error, Rec. 87.)

In this situation the Executive order of August 23 was issued forbidding any jobber to *add* to his purchase price more than 15¢ per ton. There had been no limitation placed by the statute upon Executive action. The authority given was to fix prices of coal wherever and whenever sold. To assume that the President voluntarily curtailed this power and declined to use effectively the weapon placed in his hands by Congress for the relief of a distressed, frightened, and indignant people is utterly unwarranted.

The defendant insists, however, that to argue upon the assumption that the President knew that most of the season's coal was in the hands of jobbers "is not a permissible method of legal reasoning for the construction of a law creating a criminal offense." (Brief p. 18.) On the contrary, we believe that a study of the conditions existing at the time of the enactment of a remedial statute is one of the surest guides to its true intent and purpose. The evils then existing for which the act is an appropriate remedy may properly be considered in its interpretation.

In *Holy Trinity Church v. United States*, 143 U. S. 457, which required the construction of a penal statute, Mr. Justice Brewer said (p. 463):

Another guide to the meaning of a statute is found in the evil which it is designed to

remedy; and for this the Court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.

To the same effect are:

United States v. Union Pacific R. R. Co.,
91 U. S. 72, 79.

Texas & Pacific Ry. Co. v. I. C. C., 162
U. S. 197, 210, 218.

Selective Draft Law Cases, 245 U. S. 366.

Virginia Coupon Cases, 25 Fed. 666.

We think it clear that the buying of coal was not part of the offense charged in the indictment, which consisted solely of adding an excessive margin; that the application of the President's order of August 23 to the sales made by the defendant does not make that order operate retroactively; that the plain and unambiguous language of the order applies to such cases; and, in the light of the circumstances existing at the time of the order, the only reasonable interpretation which can be placed upon it renders it applicable to such cases.

II.

Evidence offered to prove that the gross margin fixed by the Executive order would not allow the defendant any profit was properly excluded.

During the course of the trial in the District Court the defendant offered to prove by the testimony of an accountant that the cost to it of buying and selling the coal referred to in the indictment was more

than 15¢ per ton and that if it added but 15¢ to its purchase price it would sell at a loss. (Rec. 56, 57, 33.) In its general charge the Court in effect instructed the Jury that the word "profit" as used in the indictment was synonymous with "gross margin," and that it was not incumbent upon the Government to show that the defendant had received a net profit of more than 15¢ per ton. (Rec. 64.) Special charge No. 2, requested by the defendant, and framed to raise the same question, was refused. (Rec. 60, 61.) A review of these rulings is sought by the Third and Sixth Assignments of Error. (Rec. 70.)

The argument made in support of the admissibility of this testimony (Brief, 21-25) is not entirely clear. It is suggested that the President in fixing prices could act only through the Federal Trade Commission, and since this Commission when it acted was bound to consider operating costs and to allow a reasonable profit, evidence relating to such profit was admissible upon the indictment charging a violation of the President's order. (Brief, 25.) It will be noted at once that this position attacks the order as invalid because not properly made or promulgated. If well taken, it disposes of the case entirely by showing that the order alleged to have been violated was illegal and void. A discussion of this suggestion will therefore be deferred until we reach the rulings of the Court upon the motion to quash and the demurrer, where its consideration will be more appropriate.

It is also suggested that the order was unconstitutional if it be construed to deprive the defendant of a reasonable profit or to require it to sell coal at a loss. This also we set aside for discussion hereafter.

For a consideration of the admissibility of this evidence, divorced from the foregoing questions, we must assume that the President had power to act, as he did act, without the Commission. And we must assume also the constitutionality of the act and of the order. Upon these premises, was the evidence admissible?

We have first to consider the language of the order. It provides that "a jobber shall not add to his purchase price a gross margin in excess of 15¢ per ton." Not a word in the order suggests that he shall first be allowed his expenses and then a profit of 15¢. On the contrary, the words "gross margin" and "add to his purchase price" declare clearly and positively that nothing more shall be added than the margin of 15¢. Accordingly, there is nothing in the language of the order to warrant the Trial Court to enter upon an inquiry concerning costs and profits.

The defendant urges, however, that if the President be authorized to fix prices without the aid of the Federal Trade Commission, he is, nevertheless, bound to make the same inquiry concerning costs, profits, etc., as the Commission is bound to make before it may fix a price; and for this reason the Trial Court should consider evidence of costs and profits. (Brief, pp. 24-25.) But this is a patent *non sequitur*. Con-

ceding *arguendo* that the President was bound to investigate, it does not follow that in each prosecution for a violation of the order the Trial Court shall conduct such investigation. **Furthermore,** under this Record it must be conclusively presumed that the President made such investigation as the law obliged him to make, and that all of the conditions precedent to the issuance of the order have been met.

Furthermore, the quality and character of the proof offered did not make it admissible. The Trade Commission was not directed by the Statute to fix separate margins for each individual so that in every particular case a certain equal profit would be realized. On the contrary, the prices established were intended to apply generally to all producers or dealers in a given locality and to afford a fair profit only "under reasonably efficient management at the various places of production." (Section 25, paragraph (11), Act of August 10, 1917, 40 Stat. 276, 285.) Upon the trial of the case at bar there was no offer to prove what was a compensatory rate for the locality under reasonably efficient management, but merely to show that this particular defendant at a particular time would not be able to earn a profit on a gross margin of 15¢.

The Court, in disposing of the offer during the trial, correctly stated the law in these words:

The regulation promulgated by the President in accordance with the act had the force and effect of law. Now, it is like a railroad rate, duly promulgated—it is not open to

anyone to say that in a particular transaction, or in any month of transactions, the rate prescribed did not prove profitable to him. It is the rate that was prescribed by the Government of the United States in accordance, as has heretofore been held by the court, with due process of law; therefore, it is not for us to inquire whether, in this particular instance or in this particular month, and to this particular coal jobber, the rate prescribed was a profitable rate or not. The rate was binding upon all upon its promulgation. Accordingly, the evidence now proposed to be given as to the costs to this particular company, selling coal at this particular time, is not competent, and the objection to this will be sustained. (Rec. 57.)

The evidence offered was not competent upon any theory which the petitioner has advanced or which we can formulate; and the ruling of the Trial Court should be sustained.

III.

The indictment was sufficient.

A.

The President had power to fix prices without the aid or cooperation of the Federal Trade Commission.

The defendant contends that the power vested in the President by Section 25 of the Lever Act, to fix prices for coal, could be exercised by him only through the agency of the Federal Trade Commission, and that the indictment, in failing to allege

that the order was made in this manner, is fatally defective.

Section 25 of the act provides in its first paragraph (40 Stat. 284):

That the President of the United States shall be, and he is hereby, authorized and empowered, whenever and wherever in his judgment [it is] necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign: said authority and power *may* be exercised by him in each case through the agency of the Federal Trade Commission during the war or for such part of said time as in his judgment may be necessary. (Brackets and italics ours.)

This paragraph standing alone provides for the fixing of prices in two ways, either by the President acting alone or by the President acting through the Commission. The word "may," in its ordinary signification, is permissive. "It is * * * an auxiliary verb, qualifying the meaning of another verb, by expressing ability, * * * contingency, or liability, or possibility, or probability." (*United States v. Lexington Mill Co.*, 232 U. S. 399, 411; *Minor v. Mechanics Bank*, 1 Peters, 46.) The latter clause of the paragraph quoted merely authorizes the President

to act through the Commission if, in his discretion, he deems it proper to do so. It is * * * not a limitation or restriction of the power given in the preceding clauses. This the petitioner admits.

If Paragraphs 1 and 17 had stood alone, without the inclusion of the intermediate paragraphs, the construction adopted by the District Court and approved by the Court of Appeals might have been necessary * * *. (Brief, 27.)

It is urged, however, that a consideration of the remainder of the section, and of the act, render it necessary to construe "may" to mean "shall." We think a study of the entire act leads to the contrary conclusion.

It is entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel." In the first section stands this broad grant (40 Stat. 276):

The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this Act.

In the second section he is authorized to create and use any agency or agencies in carrying out the purposes of the Act. Section 5 authorizes him to license and regulate producers, dealers, and distributors of necessities, and to find what charges are just and reasonable; and his findings are made *prima facie* evidence of reasonableness in any proceeding in court.

In like manner, Sections 10, 11, 12, 13, 14, 15, and 16 vest in him powers of the broadest and most drastic character. A reading of them leaves the mind convinced of the intent of Congress to confer upon the President plenary power to deal decisively, effectively, and swiftly with any emergency which may arise. There is not a syllable to support the theory that the exercise of his powers in the premises was to await the leaden feet of an administrative or judicial investigation.

Section 25 deals exclusively with fuel, probably the most essential of all the "necessaries" dealt with by the Act. The several paragraphs of this section have been printed and conveniently numbered in the Appendix to the Petitioner's Brief and our references will be to these. Paragraphs 2-5, inclusive, give the President power to requisition and take over the plant of any producer or dealer and provide a method of fixing the compensation to be paid. It is notable that in paragraph 3 the provision is—

which compensation the President *shall fix* or *cause to be fixed* by the Federal Trade Commission. (Italics ours.)

Surely no construction could be placed upon these words which would deny to the President the power to act without the Commission.

Paragraphs 6-10 authorize the creation of a single agency for the purchase and sale of all fuel. And paragraphs 11-16, both inclusive, provide for investigations by the Commission, to be made "*when directed by the President.*"

Then follows the penal clause of this Section, which is a *separate* paragraph thereof, and which is as follows (40 Stat. 286):

Whoever shall, with knowledge that the prices of any such commodity *have been fixed as herein provided, ask, demand, or receive a higher price*, or whoever shall with knowledge that the regulations have been prescribed as herein provided, violate or refuse to conform to any of the same, shall, upon conviction, be punished by fine * * * or by imprisonment. * * * Each independent transaction shall constitute a separate offense. (*Italics ours.*)

It will thus be observed that the *penal section of this clause does not provide for punishment for violation of the prices fixed by the Federal Trade Commission, but punishment follows the violation of the price-fixing regulations as provided in this Act; that is, whether fixed by the President himself, by the President acting through the Federal Trade Commission, or by any agency created by the President for that purpose* (which last method was specifically authorized by Section 2 of the Act). The provisions of the penal section of the Act and its legislative history will be helpful to the court in construing the first paragraph of section 25.

This Act was first passed by the House, and before being passed by the Senate was amended in many particulars. The House having refused to accept the amendments, the bill was sent to conference. The

penal paragraph of this section of the Act as first passed by the Senate provided as follows:

Whoever shall, with knowledge that the prices of any such commodity so fixed *by the Commission, ask, demand, or receive a higher price in violation of this section shall, upon conviction, be punished, etc.* (Congressional Record, 65th Cong., 1st Sess., Vol. 55, Pt. 5, p. 5362.)

The Conference Committee thereupon struck out the words "*So fixed by the Commission*" and substituted in lieu thereof the words "*Fixed as herein provided,*" and eliminated "*In violation of this section,*" (Congressional Record, 65th Congress, 1st Sess., Vol. 55, Pt. 6, p. 5735.)

It thus appears that Congress, before the final passage of this Act, amended and changed this penal paragraph, making it an unlawful violation to sell coal at prices in excess of those fixed as *provided in the Act, removing therefrom any references to prices fixed by the Federal Trade Commission under "this section," thus clearly showing that the Congress intended that the prices might be fixed either by the President or by any Board, Bureau, or Agency which the President might create under Section 2 of the Act for that purpose.*

It must be kept in mind, as hereinbefore set forth, that at the time the Act was passed and Executive order promulgated there was a critical condition in the coal industry of our country as well as that of our Allies. There was the great coal strike. Coal producers were selling their entire output at exorbitant prices. There was no necessity for the intervention

of a middleman or jobber. It was not desirable that broker or jobber should make an excessive profit for the rehandling of coal. In this situation it was not feasible and the Congress never intended that the whole coal business should be *first minutely investigated* by the Trade Commission before the prices should be fixed. When this Act was first introduced some two months before its passage the whole coal situation was not so acute, but when the Act was finally amended and passed the situation had changed, and it was necessary, in order to protect the public and aid in the successful prosecution of the war, that immediate remedial action should be taken by the President himself by the fixing of prices. The situation demanded immediate action. There was no time to redraw the whole Act but only to put it in such shape that the President could act without the delay which would be required for action by the Federal Trade Commission.

The reason urged by counsel for the Petitioner for applying a forced construction of the language of paragraph 1 is not satisfactory. Briefly stated, this reason is that in the subsequent paragraphs of the section Congress prescribes the procedure to be adopted by the Federal Trade Commission in case the President shall call upon it to fix prices of coal or coke, from which fact counsel asks the court to infer that Congress did not intend such prices to be fixed in any other manner. The only justifiable inference from these provisions is that Congress did

not intend the *Federal Trade Commission* to fix prices in any other manner.

It is quite unwarrantable to use the limitation placed on the Federal Trade Commission's authority as an argument in favor of stripping the Chief Executive of the power which the plain language of the first paragraph of Section 25 had vested in him. To do so would, in fact, defeat the principal purpose of the statute.

There was an acute emergency with regard to fuel and danger of a runaway market, the evil consequence of which would extend far into the winter. So far as that emergency was concerned, the prime necessity was that fuel should be immediately placed under full Government control, *not that any particular procedure should be followed in fixing prices*. It is inconceivable that Congress intended that no action should be taken with regard to fuel prices until after the conclusion of a long and laborious investigation. What was needed was a complete, unhampered authority, concentrated where it could be exercised promptly and efficiently, and Congress vested that authority in the President of the United States in the full confidence that it would be exercised wisely and justly. The fact that it subsequently prescribed certain limitations upon the authority of a subordinate governmental agency warrants no inference of any intention to restrict the power of the President.

There was ample ground for the provisions with regard to the Federal Trade Commission without

resorting to the construction that it was to be a limitation upon the President's authority.

It was natural that when the proposal for Government control of the prices of coal and coke was made the fact that the Federal Trade Commission had been created and organized to make investigations and gather information which would be of value in such an enterprise should associate it with that proposal; and that Congress should wish the President to have authority to make full use of the information and experience of that body if he so desired.

But the Federal Trade Commission was the creation of a statute. It had no powers except those conferred by that statute, and the fixing of prices of any commodity was not among those powers. The reasonable explanation of the action of Congress in authorizing the President to exercise his power over fuel prices through the agency of the Federal Trade Commission is, therefore, not that it intended to limit him to the use of that agency but that it intended to give him power, *if he saw fit*, to require of the Commission the performance of a duty which the law of its creation not only did not impose upon it, but did not authorize it to perform.

And thus from a reading of the entire Act, from a consideration of its policy and purpose, and from a glimpse of its legislative history, we return to the crystal language of the grant of power to the President, not only without having found any reason for altering it, but with a firm and settled conviction

that Congress meant precisely what it said when it used these words (40 Stat. 284):

said authority and power *may* be exercised by him in each case * * * through * * * the Federal Trade Commission. (Italics ours.)

The same conclusion was reached by the District Court for the Western District of Pennsylvania in *United States v. Pennsylvania Central Coal Co.*, 256 Fed. 703.

Furthermore, the construction of the Act here urged was adopted and consistently followed by the Executive and Legislative branches of the Government.

The President, to whom the execution of the Lever Act was committed, was, of course, bound to place some construction on it for the purpose of determining what authority and power it conferred on him. His appointment of Doctor Garfield is conclusive evidence that he construed it as conferring upon him power to fix prices of coal and coke independently of the Federal Trade Commission, and also authority to delegate that power.

After the Executive order of August 23, 1917, appointing Doctor Garfield, he acted as United States Fuel Administrator, fixing prices of coal and coke, and regulating the method of production, sale, shipment, distribution, and apportionment thereof, and created the organization known as the United States Fuel Administration.

In and by the Act of Congress entitled "An Act making appropriations for sundry civil expenses of

the Government for the fiscal year ending June thirtieth, nineteen hundred and nineteen, and for other purposes," approved July 1, 1918 (40 Stat. c. 113, pp. 634, 648), Congress appropriated the sum of \$3,500,000 "for expenses of the United States Fuel Administration created under authority contained in the Act entitled 'An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' " approved August 10, 1917, thus expressly recognizing the legality of Doctor Garfield's appointment to fix the prices of coal and coke and regulate the business of producing and dealing in the same, and the standing of the United States Fuel Administration as a duly and legally constituted Government agency.

Even if it were conceded that a doubt exists whether, as an original question, such construction ought to have been placed on the statute, the fact that the act has been so construed by the President and by Congress should be controlling.

While it is true that the interpretation of statutes is a judicial question, the principle that the contemporaneous construction placed upon a statute by those officers whose duty it is to execute it is entitled to great and, in case of doubt, to controlling weight in the courts. It received early recognition in the Supreme Court and is well established by the later decisions.

Under our system an interpretation can be given to a statute by a court only when the question arises in some litigated case. This may never occur, or if it does, may not occur for a considerable period, during which the executive branch of the Government must proceed with the enforcement of the law according to its own interpretation, and thus give rise to rights of property or contract which will be jeopardized or destroyed unless the Executive interpretation is sustained. It is for this reason that in some of the cases the element of the time during which the practical construction has continued is regarded as important. But it is manifest that the fact that Executive practice has been long continued is only important as it increases the extent to which a disturbance of the practice would injuriously affect private or public rights acquired under it.

In the case of the Lever Act, the intensive character of its enforcement evidently renders the element of time important. Millions of people have been directly and palpably affected by what has been done under its authority. The overwhelming majority of both dealers and consumers of fuel have acquiesced in good faith in the decisions and orders of the Fuel Administrator. The entire fuel business of the country was remodeled in obedience to his regulations. Industries were profoundly affected and they readjusted their plans to the situation created by the existence of the Fuel Administration, and these plans

and thousands of contracts depended upon the validity of its regulations.

If five decisions of the Interior Department were sufficient in *United States v. Hammers*, 221 U. S. 220, 225, to create rights which made the practice of the Interior Department "determinatively persuasive" in the Supreme Court, it is submitted that there can be no question of the controlling character of the practice of the Executive department under the Lever Act.

A further reason for the rule is to be found in the fact that the Legislature is presumed to know the construction placed upon the statute by the officers charged with its execution, and its acquiescence in that construction is presumptive evidence that those officers are carrying out its intention.

In the case at bar it is unnecessary to resort to a presumption. By the appropriation referred to above, Congress has unequivocally indorsed not only the action of the President in appointing a Fuel Administrator, but that officer's action in creating and organizing the Fuel Administration.

This statute should be liberally construed. Although it imposes a penalty in case of its violation, it is not a penal statute, but highly remedial. Its purpose is not to define a criminal offense and prescribe a punishment therefor, but "to assure an adequate supply and equitable distribution, and to facilitate the movement, of foods, feeds, fuel including fuel oil and natural gas," etc. (40 Stat. 276.)

Thus it falls within the rule announced in *Taylor v. United States*, 3 How. 197, in the following language (p. 210):

In one sense, every law imposing a penalty or forfeiture may be deemed a penal law; in another sense, such laws are often deemed, and truly deserve to be called, remedial. The judge was therefore strictly accurate, when he stated that "It must not be understood that every law which imposes a penalty is, therefore, legally speaking, a penal law, that is, a law which is to be construed with great strictness in favor of the defendant. *Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in the strict sense, penal acts, although they may inflict a penalty for violating them.*" (Italics ours.)

The Lever Act is manifestly a law of the class here described—a law enacted for the suppression of a public wrong and to effect a public good, and it should be construed so as most effectually to accomplish that purpose. Under such construction the President had power to fix jobbers' margins without the aid of the Federal Trade Commission; and the indictment in this case was sufficient.

B.

The allegations of the indictment are definite and certain.

The indictment charged the defendant with adding a "profit or gross margin" in excess of 15¢ per ton.

Counsel argue (Brief, 32-37) that the word "profit," as used in the indictment, means "net profit"; that the use of it in conjunction with "gross margin" renders the indictment indefinite and uncertain; and, further, that the defendant was entitled to acquittal because the Government failed to show that he made any net profit.

The term "profit," without qualifying words, has a variety of meanings, as any business man or accountant will attest. It gathers its precise signification from its adjective complements and its context. This is true, not only of this word but of many, and is a fact generally and commonly known. As used in this indictment it can derive its precise meaning only from the words "gross margin," which are three times used in conjunction with it. They are connected by the correlative "or," which unmistakably imports that the one is to be deemed the synonym of the other. If the term "profit" be so qualified as to mean "gross profit," as the trial court very properly held should be done (Rec. 47), then the meaning of the charge laid in the indictment is clear and unambiguous.

Counsel have cited cases which hold "profit" to mean "net profit." Others could be cited which hold that it means "gross profit." All would alike be without authority in this case, for the term gathers its meaning from the associated words, and those words which render its meaning precise and definite *in this case* are the words of *this indictment*.

To assume that "profit" here could be misunderstood to mean "net profit" or that the correlative "or" is here used to connect alternatives, would be an affront to the intelligence of the defendant or of anyone fairly conversant with the English language.

IV.

The Executive order was not a taking of property without due process of law in violation of the Fifth Amendment.

The defendant contends that the President's order, made without the cooperation of the Federal Trade Commission, constituted a taking of its property without due process of law; and that section 25 of the Lever Act, under authority of which the order was made, was unconstitutional and void because in contravention of the Fifth Amendment. The particular reasons urged are that the act made no provision for notice to the defendant and a hearing prior to the making of the order, gave it no right of appeal to any judicial body, provided no means for determining whether the margin allowed was compensatory, and no means whereby the damages which it claims to have suffered might be adjudicated.

The Act, and the President's order made in pursuance of it, are justified, if at all, as a proper and reasonable exercise of the war power of the United States.

The contention, striking as it does at an essential exercise of the Nation's war power, and at the same time made on behalf of the property rights of the

individual so carefully safeguarded by the Constitution, challenges a searching inquiry into its merits.

A.

The Executive order was valid, regardless of whether the defendant could conduct his business profitably thereunder. Congress, in the exercise of the war power, may control and regulate or may prohibit and destroy the business of trading in coal.

The Constitution of the United States vested in Congress the power (Article I, section 8):

(11) To declare war * * *.

(12) To raise and support armies * * *.

(13) To provide and maintain a Navy
* * *.

(14) To make rules for the Government and regulation of the land and naval forces.

(15) To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.

(16) To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the Service of the United States * * *.

and

(18) To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

At the same time it completely divested the States of their power (Article I, section 10) to—

engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

The history of the desperate struggle to keep and maintain the Continental Army, so familiar to all, and so vivid in the minds of the framers of the Constitution, leaves no doubt of their purpose and intention to vest in the Federal Government plenary power to wage war. The war power is one "upon which the very life of the Nation depends." (Mr. Justice Brandeis in *Hamilton v. Kentucky Distilleries Company*, 251 U. S. 146, 163.) It is the Nation's power of self-preservation. It is analogous to and has many of the incidents of the police power of the States.

That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose. * * * If the nature and conditions of a restriction upon the use or disposition of property is such that a State could, under the police power, impose it consistently with the Fourteenth Amend-

ment without making compensation, then the United States may for a permitted purpose impose a like restriction consistently with the Fifth Amendment without making compensation. (Mr. Justice Brandeis in *Hamilton v. Kentucky Distilleries Company*, 251 U. S. 146, 156.)

The war power can not be limited by contract or bargained away by Congress. It is seldom called into use, but when circumstances require it, its exercise is not fettered or limited save by the rule of reasonable necessity. It is not a new power created or brought into being by a state of war or other grave emergency. It is a power which exists at all times, though latent. It lies like a burnished sword at the hand of the Federal Government ready for instant use; and the life, liberty, and property of citizens are possessed and enjoyed subject to the implied limitation placed upon them by its existence. The mere existence of a state of war or the exercise of the war power do not of themselves suspend or limit constitutional guaranties, but they do cause "limitations, which the Constitution made applicable as the necessary and appropriate result of the status of war, to become operative." (Mr. Chief Justice White in *United States v. Cohen Grocery Company*, 255 U. S. 81, 87.)

Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.

(Mr. Chief Justice White in *Wilson v. New*, 243 U. S. 332, 348.)

It is of course clear that neither the existence of a state of war nor the exercise of the war power can justify the slightest interference with individual rights guaranteed by the Constitution, in any matter which is not reasonably necessary and appropriate for the successful prosecution of a war. It is equally clear that in a matter which is essential to the efficient prosecution of a war the exercise of the Federal power is paramount over the rights of the individual. (*Miller v. United States*, 11 Wall. 268; *Stewart v. Kahn*, 11 Wall. 493, 506.) The right of self-preservation without the power to do that which may be reasonably necessary to make it effective would be a mockery.

That the safety of the Republic is the first law, is as true now as when the Romans so declared. (*United States v. Pennsylvania Central Coal Company*, 256 Fed. 703, 705.)

The views which we have just expressed concerning the nature and extent of the war power are sustained by the recent decisions of this Court. Ordinarily, the individual is secure from interference by the Government in the enjoyment of personal liberty. Yet, under the war power, the United States may lay its hand upon him, interrupt his pursuit of a pleasant and remunerative occupation, place him under the strict discipline of a military camp, transport him beyond the seas, expose him to the shot and shell of the enemy, and compel him to exert his energy and

talents exclusively in the business of killing human beings. That this is a restraint of his personal liberty can not be denied, but throughout his life the citizen lives subject to the possibility that this restraint may be imposed. He is merely called upon to fulfill an obligation which always was his and the call is recognized as lawful, proper, justified, and constitutional. (*Selective Draft Law Cases*, 245 U. S. 366.)

The use of property also has been limited by the exercise of the war power. (*Hamilton v. Kentucky Distilleries Company*, 251 U. S. 146; *Ruppert v. Caffey*, 251 U. S. 264; *McKinley v. United States*, 249 U. S. 397.) And the right which the individual ordinarily has to discuss war and peace, the naval and military policies of the Nation, and the official Acts of Congress, the Cabinet and the Courts, has been curtailed by limitations placed upon it which this Court has recognized as consistent with the Constitution. (*Schenck v. United States*, 249 U. S. 47; *Frohwerk v. United States*, 249 U. S. 204; *Debs v. United States*, 249 U. S. 211.)

That war can not be successfully waged without men, munitions, supplies, and a Nation with the "will to win," opens another field in which the war power may constitutionally operate to restrain the free use of property and the peace time liberty of contract. The Government may control and regulate those products of husbandry and of industry which are essential to supply the Army and Navy and to main-

tain the people. Such products are appropriately designated in the Lever Act as "necessaries" and include food, fuel, and munitions.

The World War was not merely a struggle between contending armies and navies but a contest between peoples. Success depended not only upon raising and maintaining the militant forces but was dependent also upon the maintenance of reasonably stable and satisfactory economic, industrial, and social conditions among the noncombatants. The mental, moral, and spiritual attitude of the people toward the war was recognized as being of vital importance. Every nerve was being strained in the effort so to marshal our great strength and resources that they might prove effective upon the field. Millions of men were withdrawn from the accustomed pursuits of peace and their labor expended entirely in the prosecution of the war. Due to unparalleled demands for food and fuel, these necessities became the subject of widespread and unrestrained speculation. A constantly rising market encouraged hoarding. The effect of such practices upon the morale of the people threatened danger if not disaster.

In this situation, coal, which was one of the principal "necessaries," was clothed with a public interest which made its production, transportation, sale, distribution, and use the proper subject of regulation by the Federal Government.

When private property is affected with a public interest, it ceases to be *juris privati* only. (*Munn v. Illinois*, 94 U. S. 113, 126.

See also *Block v. Hirsh*, 256 U. S. 135; *Marcus Brown Holding Company v. Feldman*, 256 U. S. 170; *Levy Leasing Company v. Siegel*, 258 U. S. 242.)

Property which by reason of its public interest has become subject to regulation under the police power (and the war power) is of two general classes—that which is fraught with such danger to the public that it may be destroyed without compensation, and that which by a mild form of public control may be made to render invaluable service. A house may be dynamited if it be in the path of a conflagration and its destruction be an appropriate means of preventing further spread of the fire; dogs and other animals in which a right of property is recognized may be destroyed; liquor and narcotics may be seized and confiscated; the business of dealing in liquor or oleo-margarine may be forbidden; the use of property exclusively adapted to the production of these commodities may be destroyed; and all of this without any compensation to the owner. These are recognized as reasonable exercises of the police power.

The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public is not—and, consistently with the existence and safety of organized society, can not be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain by reason of their not being permitted, by a noxious use of their

property, to inflict injury upon the community. (Mr. Justice Harlan in *Mugler v. Kansas*, 123 U. S. 623, 669. See also *Powell v. Pennsylvania*, 127 U. S. 678, 683.)

On the other hand, the well-established control of public utilities furnishes an illustration of that other class of property which the State may regulate, but must preserve. (*Smyth v. Ames*, 169 U. S. 466.)

Whether property, or a business, or a right to contract be of such a character that the public welfare requires its destruction, is a question to be determined in the first instance by the legislative body which sits as a general assize of the public's needs. Its determination, though subject to review by the courts, is entitled to great weight. The Lever Act (Sec. 25, paragraphs 6-10) placed the business of trading in coal within this class. It gave the President power to establish an agency which might purchase all coal produced throughout the country and arrange for its distribution and sale. The establishment of such an agency would have destroyed *eo instanti* the jobber's business.

There can be no doubt that the conditions existing in the summer of 1917 justified Congress in enacting this provision. The market for bituminous coal, having gradually risen from a relative price of 94 in 1915 to 140 in 1916, shot up to 297 in June, 1917. Every transaction by a middleman tended to inflate prices. Under the practices then obtaining, the jobber's business was rapidly becoming noxious. Its total destruction without compensation would

have been fully justified as a constitutional exercise of the war power. *A fortiori* it was subject to the milder regulation of a fixed margin, regardless of whether such margin allowed a jobber to conduct his business profitably. The many rate cases cited by counsel for the petitioner furnish no precedents applicable here, for we are dealing with business and property of a different character.

Though the war power will not justify the taking of private property without compensation, it will justify a necessary restraint upon the use of property or the conduct of a business. The President's order, being equal, uniform, and nondiscriminatory in its operation, was constitutional, whether the margin fixed allowed a profit or not.

B.

If it be necessary that the jobber's margin be a profitable one, nevertheless the ascertainment of that fact by judicial process is not essential to due process of law.

If, however, we were to concede that Congress and the President were obliged to fix a price or margin which would allow the defendant a profit, the statute and order are none the less constitutional. Due process of law does not always demand judicial process.

In its broadest scope due process of law guarantees to the individual that his life, liberty, and property shall not be interfered with excepting in such respects, by such authority, and in such manner as is sanctioned by the settled usages and modes of proceeding

existing in the common and statute law of England at the time of the organization of our Government, and which are not unsuited to our civil and political system. (*Munn v. Illinois*, 94 U. S. 113; *Lowe v. Kansas*, 163 U. S. 81; *Twining v. New Jersey*, 211 U. S. 78, 101.) "The constitution makes no attempt to define such process, but assumes that custom and law have already settled what it is." (Cooley, J., in *Weimer v. Bunbury*, 30 Mich. 201, 213.)

What is due process depends upon the circumstances of the particular case. There is probably no governmental regulation which does not in some manner interfere with the liberty of the individual or affect the use of his property. Nevertheless, if it be imposed by that authority having power to make such regulations, if it be equal and uniform, and if it be reasonably appropriate to effect a legitimate public purpose, it is justified and constitutes due process of law. There are many cases in which this Court has recognized that due process of law does not require a judicial proceeding.

The power of Congress and of the legislatures of the States to fix a certain number of hours which persons may work without detriment to their health and in justice to their employers is recognized, although no provision be made before or after the enactment of the statute for a judicial inquiry into the facts concerning individual employers or employees. (*Muller v. Oregon*, 208 U. S. 412; *Wilson v. New*, 243 U. S. 332.) The fixing of a maximum rate

of interest which persons may charge for the use of money is a familiar example of price fixing by the legislature without provision for judicial inquiry. (*Morley v. Lake Shore & Mich. So. Ry. Co.*, 146 U. S. 162.)

In *Public Clearing House v. Coyne*, 194 U. S. 497, Mr. Justice Brown said (p. 508):

It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an executive department. Many, if not most, of the matters presented to these departments require for their proper solution the judgment or discretion of the head of the department, and in many cases, notably those connected with the disposition of public lands, the action of the department is accepted as final by the courts, and even when involving questions of law this action is attended by a strong presumption of its correctness. (*Bates and Guild Company v. Payne*, 194 U. S. 106.) That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and by many eminent writers upon the subject of constitutional limitations. (*Murray's Lessee v. Hoboken Company*, 18 How. 272, 280; *Bushnell v. Leland*, 164 U. S. 684.) As was said by Judge Cooley in *Weimer v. Bunbury*, 30 Mich. 201: "There is nothing in these words, ('due process of law') however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the Government is carried on and the order of society maintained is purely

executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress." If the ordinary daily transactions of the departments, which involve an interference with private rights, were required to be submitted to the Courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of the Government.

In a variety of cases, this Court has held that Executive orders and decisions which affect liberty and property are due process of law.

Murray's Lessee v. Hoboken Land Co., 18 How. 272 (determination of amount due from defaulting revenue collector and summary process for collecting same).

Burfenning v. Chicago, etc., Ry. Co., 163 U. S. 321, 323; *Smelting Co. v. Kemp*, 104 U. S. 636 (determination of issues of fact by officers of the Land Department).

Springer v. United States, 102 U. S. 586 (collection of taxes by summary process).

Ex parte Wall, 107 U. S. 265 (disbarment of an attorney).

Parsons v. District of Columbia, 170 U. S. 45 (assessment of benefits against property).

Buttfield v. Stranahan, 192 U. S. 470 (exclusion of goods from import).

Bates & Guild Co. v. Payne, 194 U. S. 106 (exclusion of matter from second-class mail).

Moyer v. Peabody, 212 U. S. 78 (imprisonment without trial in time of insurrection).

Turning to the matter of the regulation of prices of essential commodities, we find that in England prior to the organization of our Government price fixing was a well-recognized function of the law-making power, which it might exercise directly or through administrative officers.

The Statute of Laborers, passed in 1349 (2 Stat. of England, c. VI, pp. 26, 28), provided that all sellers of victuals should be bound to sell them "for a reasonable price, having respect to the price that such victual be sold at in the places adjoining, so that the same sellers have moderate gains, and not excessive." The Statute of Herrings (1357) (2 Stat. of England, p. 117) fixed the price of herrings. The Statute of 1363 (2 Stat. of England, p. 162), in chapter 5, after reciting that grocers engross all manner of merchandise by combination in guilds, selling that which is most dear and keeping in store the other, it was provided that a merchant should deal in only one kind of merchandise. By chapter 3 of the same statute the price of poultry was fixed, and by chapter 15 the prices of clothes. In 1389 justices of the peace were authorized to fix wages according to circumstances, and it was provided that victuallers "shall have reasonable gains, according to the discretion and limitation of said justices, and no more, upon pain to be grievously punished." (2 Stat. of England, c. 8, pp. 313-314.) In 1433 the price of candles was fixed by the price of plain wax. (3 Stat. of

England, c. XII, p. 196.) In 1487 the prices of cloths and hats were fixed by a maximum rate. (4 Stat. of England, c. VIII, IX, p. 41.) In 1531 brewers were prohibited from charging higher prices for ale and beer "than shall be thought convenient and sufficient by the discretions of the justices of the peace within every shire" or by the officials of cities, boroughs, and towns. (4 Stat. of England, c. V, p. 220.) In 1533 it was provided that whenever complaint was made of enhancing the price of victuals certain State officials should have power from time to time "to set and tax reasonable prices of all such kinds of victuals." (4 Stat. of England, c. II, pp. 263, 264.) In 1536 certain officials were authorized to set the price of wines. (4 Stat. of England, c. XIV, p. 439.) In 1549 all persons were prohibited from buying butter and cheese to sell again, unless they sold by retail in open market. (5 Stat. of England, c. XXI, p. 347.) In 1709 the price of bread was fixed by the price of wheat. (12 Stat. of England, c. XVIII, p. 77.) Numerous other similar statutes could be cited, but the above sufficiently illustrate governmental practices under the common law.

The defendant's contention was fully met by the Circuit Court of Appeals with the proposition that—

due process of law is not to be tested by form of procedure merely; that public danger warrants the substitution of executive processes for judicial process (*Moyer v. Peabody*, 212 U. S. 78, 84); and that under the war condi-

tions then existing, and as indicated by the preamble of the act, the fixing of prices in industries so vital to the prosecution of the war as food and fuel was not the deprivation of due process of law, but is within the power given to Congress by Article I, section 8, of the Constitution, to make all laws necessary and proper for carrying into execution the war powers expressly enumerated. (Rec. 88.)

The principal reason why in certain cases executive or administrative process may be substituted for judicial process is that the latter is not practicable. (*Weimer v. Bunbury*, 30 Mich. 201; *Hagar v. Reclamation Dist.*, 111 U. S. 701, 708.) It is not suited to the making of those adjudications which in order to be effective must be made promptly nor is it appropriate where the number of cases which may arise is multitudinous. In the collection of the public revenue, for example, it is absolutely essential that levies shall be made promptly and collected with dispatch, otherwise the operations of the Government may be seriously interfered with. In the matter of excluding individuals or commercial products from the country it is essential that adjudications be made promptly and decisively, else the ports of the country would become hopelessly blocked. In the matter of fixing prices for necessary commodities it is absolutely essential that there be reposed in some executive official or department the power to fix prices speedily, otherwise the injury to the public resulting from unstable markets could not be avoided. Further-

more, it would be utterly impracticable to provide a judicial means whereby in each commercial transaction it might be determined whether the price allowed were profitable to the seller. When we pause to consider that whenever among a hundred millions of people a loaf of bread, a sack of flour, a pound of sugar, a gallon of oil, or a ton of coal was sold during the war the prices fixed under authority of the Lever Act might be applicable—and that in each and every instance the seller might demand a judicial investigation to determine whether the prices fixed by the Government were profitable—the staggering multitude of such possible actions conclusively demonstrates the impracticability of providing judicial process as a shield for the protection of private rights. We are driven to the conclusion that the necessities of the case demanded and required the establishment of a price by administrative order; and that such order, made under authority of Congress and the President, and being equal and uniform in its operation upon all, did not deprive anyone of property without due process of law. Any attempt to apply judicial process to the adjudication of such cases would result in hopeless confusion.

Moreover, when we examine the particular order here in question we find that it was not arbitrarily and unreasonably made without regard to the question of whether it would allow a profit. The President's order did not fix the price at which the jobber should sell his coal. He fixed a margin which might in each instance be added to the purchase price. In the

business of trading in coal the largest factor of expense is the purchase price of the coal. This the President permitted in all cases and added to it a margin which from all the information obtainable he believed was sufficient to cover a jobber's reasonable operating expenses and profit.

C.

The Lever Act and the Executive order did not take the defendant's property.

We have already observed that the power exercised by Congress in the enactment of the Lever Act was the war power. In establishing a price or margin which might be charged for coal, the Congress was not exercising the power of eminent domain. It was not taking property for public use nor was it condemning the property of one person and turning it over to another. It was merely laying down a rule of conduct, fixing and prescribing the conditions under which a business, fraught with great import to the public, might be legitimately conducted.

That it restricted the right of the individual to contract freely may be admitted. But this is not a taking of property. The right of contract is "subject to the fundamental condition that no contract, whatever its subject matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good. This Court has said that 'in every well-ordered society charged with the duty of conserving the safety of its

members, the rights of the individual in respect of his liberty may, at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.' *Jacobson v. Massachusetts*, 197 U. S. 11, 29, and authorities there cited." (*Adair v. United States*, 208 U. S. 161, 172.)

In *Hamilton v. Kentucky Distilleries Company*, 251 U. S. 146, it was held that the war-time prohibition act, which very seriously limited the use of breweries and distilleries, was not a taking of property. And in *Ruppert v. Caffey*, 251 U. S. 264, the same conclusion was reached with respect to beer which had already been lawfully manufactured and was ready for immediate sale. In the latter case Mr. Justice Brandeis said at p. 303:

Here, as in *Hamilton v. Kentucky Distilleries & Warehouse Co.*, *supra*, there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use.

With respect to the beer already manufactured and ready for immediate sale, it was said (p. 301):

Hardship resulting from making an act take effect upon its passage is a frequent incident of permissible legislation; but whether it shall be imposed rests wholly in the discretion of the lawmaking body.

The defendant had no vested right in any profits which might accrue to it from the sale of coal. The market was abnormal and Congress, by the Lever Act,

merely destroyed the noxious use of property and prevented its being handled and dealt with in such manner as to inflict injury upon the public. In so doing it exercised the war power, not the power of eminent domain, and the interference, if any, with private rights was merely incidental to the necessary public regulation.

V.

The Lever Act did not delegate legislative or judicial power in violation of the Constitution.

In *Wayman v. Southard*, 10 Wheat. 1, 42, 43, Mr. Chief Justice Marshall said:

It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.

It is the function of Congress to determine and to declare general policies. It also has the power to prescribe the precise form and method by which they shall be administered. The former power is exclusively legislative and can not be delegated, but the latter may lawfully be committed to administrative officers, boards, or commissions. To deny this power to the Government to-day would make of Congress a Cabinet; and would "stop the wheels of Government."

A few instances will suffice to show that this principle is well settled.

In *Field v. Clark*, 143 U. S. 649, it was held that an Act of Congress which gave the President the power to suspend by proclamation the free introduction of sugar, molasses, etc., was valid.

In *United States v. Grimaud*, 220 U. S. 506, an Act which gave to the Secretary of Agriculture the power to "make such rules and regulations and establish such service as will insure the objects of such [forest] reservation, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction," and which provided that "any violation of the provisions of this act or such rules and regulations shall be punished," was sustained against the objection that it gave the Secretary the power to legislate. Mr. Justice Lamar, speaking for the Court, said (p. 517):

From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details" by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done.

In *Mutual Film Corporation v. Ohio Industrial Commission*, 236 U. S. 230, an Act of Ohio which provided that "only such films as are in the judgment and discretion of the Board of Censors of a moral, educational or amusing and harmless character shall be passed and approved by such Board," was declared to be a lawful and proper delegation of power to the Board of Censors.

"In *Union Bridge Company v. United States*, 204 U. S. 364; *In re Kollock*, 165 U. S. 526; *Buttfield v. Stranahan*, 192 U. S. 470, it appeared from the statutes involved that Congress had either expressly or by necessary implication made it unlawful if not criminal, to obstruct navigable streams; to sell unbranded oleomargarine; or to import unwholesome teas. With this unlawfulness as a predicate, the executive officers were authorized to make rules and regulations appropriate to the several matters covered by the various acts. A violation of these rules was then made an offense punishable as prescribed by Congress. But in making these regulations, the officers did not legislate. They did not go outside of the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done. But, confining themselves within a field covered by the statute, they could adopt regulations of the nature they had thus been generally authorized to make, in order to administer the law and carry the statute into effect." (*United States v. Grimaud*, 220 U. S. 506, 518.)

Congress provided that after a given date only cars with draw bars of uniform height should be used in interstate commerce, and then constitutionally left to the Interstate Commerce Commission the administrative duty of fixing a uniform standard. (*St. Louis & Iron Mountain Railway v. Taylor*, 210 U. S. 281, 287.)

Congress has declared that it is unlawful for common carriers in interstate commerce to charge unreasonable rates or to discriminate between shippers, and has given to the Interstate Commerce Commission authority to determine what are reasonable rates and what are discriminatory practices. This power has been sustained. (*Interstate Commerce Commission v. Illinois Central Railroad*, 215 U. S. 452; *Interstate Commerce Commission v. Chicago, Rock Island, etc., Railroad*, 218 U. S. 88.) The same is true of acts of the State legislatures delegating like power to public-service commissions. (*Wichita Railroad & Light Company v. Kansas*, 260 U. S. 48.)

All of these cases, but more particularly the rate cases last cited, sustain the power of Congress to delegate to the President the power to fix prices of necessary commodities. The first section of the Lever Act (40 Stat. 276) declared that "it is essential to the National Security and Defense, for the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement of foods, feeds, fuel,

* * *; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting such supply, distribution, and movement." Here the legislative power has declared its policy and has enumerated those evils which, by administration of the act, are to be avoided. It has further declared that one of the means of accomplishing the purposes of the act shall be the regulation of prices. Having gone this far, Congress has itself exercised that power which was exclusively legislative. What was committed to the President was merely the administrative power to carry out the policy declared in the act. In this there is no unconstitutional delegation of legislative power.

VI.

The Lever Act was not an abuse of the congressional power to provide for the national security and defense, nor was it an invasion of the reserved powers of the States.

It is urged by the defendant that Congress exceeded the lawful scope of its war power when it attempted, by the Lever Act, to control and regulate the price of coal. (Brief, pp. 63-66.) This objection scarcely merits serious consideration. That coal is a necessary commodity not only for the maintenance of the Army and Navy but for the maintenance of the life and health of the people during a war, and that the control of its sale and distribution is as vital as control of its production, are axioms.

An attempt to stabilize the coal market, to prevent monopolization and speculation, without the power to fix prices, would be as abortive as an attempt of the Interstate Commerce Commission to regulate the business of the railroads without the power to fix rates.

Nor does the objection that the Lever Act violates the Tenth Amendment, by interfering with the reserved powers of the State, merit any extended discussion. It is true that aside from the war power Congress has no constitutional authority to fix the price of coal and that this authority, if it exists at all in peace times, is reserved to the States. The same thing was true of the regulation of the liquor traffic prior to the Eighteenth Amendment. Nevertheless, Congress under the war-time prohibition acts exercised complete control over it. In *Hamilton v. Kentucky Distilleries Company*, 251 U. S. 146, it was said at p. 156:

That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose.

The regulation of the prices of necessities being within the war power of Congress, the exercise of this power is not an invasion of the powers reserved to the States, although in peace time the States alone may exercise such authority.

CONCLUSION.

We respectfully submit:

1. That although the defendant purchased its coal on July 31, 1917, the Executive order of August 23, 1917, applied to all sales of that coal which were made after the latter date.
2. That the evidence offered by the defendant during the trial for the purpose of proving that the gross margin fixed by the order of August 23 would not allow it any profit was properly excluded.
3. That the President had power to fix jobbers' margins without the aid or cooperation of the Federal Trade Commission, and that the term "profit," as used in the indictment, is equivalent to gross margin. Accordingly, the indictment was sufficient.
4. That the Executive order was valid regardless of whether the defendant could conduct his business profitably thereunder, and that even if it were otherwise, the ascertainment of that fact by judicial process was not essential to due process of law; wherefore the act of Congress and the President's order were not unconstitutional as a taking of property without due process of law.

5. That the Lever Act did not delegate legislative power, but merely provided for administrative regulation.

6. That the Lever Act was not an abuse of the war power, nor an invasion of those rights reserved to the States by the Tenth Amendment.

The judgment of the Court below should be affirmed.

GEO. ROSS HULL,
Special Assistant to the Attorney General.

SEPTEMBER, 1923.

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MATTHEW ADDY COMPANY *v.* UNITED STATES.

FORD *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
SIXTH CIRCUIT.

Nos. 84 and 85. Argued October 17, 18, 1923.—Decided February
25, 1924.

1. In a prosecution for violation of an order of the President fixing prices of coal, under the Lever Act (August 10, 1917, c. 53, § 25, 40 Stat. 276), the order must be construed, as criminal statutes are, strictly, and without retroactive effect unless clearly indicated. P. 244.
 2. A construction which raises a grave constitutional question should be avoided. P. 245.
 3. *Quaere*: Whether Congress, when enacting the Lever Act, could constitutionally have fixed prices at which persons then owning coal might sell it, without providing compensation for losses? *Id.*
 4. The President's Order of August 23, 1917, limiting jobbers to a gross margin of 15¢ per ton in reselling bituminous coal, did not apply to sales f. o. b. the mines, contracted and made by jobbers after the date of the order, of coal purchased by them f. o. b. the mines before the dates of the order and the Lever Act. P. 245.
- 281 Fed. 298, reversed.

CERTIORARI to judgments of the Circuit Court of Appeals affirming fines imposed on the petitioners, in criminal prosecutions based on the Lever Act.

Mr. Julius R. Samuels, with whom *Mr. Nelson B. Cramer* was on the briefs, for petitioners.

Mr. Geo. Ross Hull, Special Assistant to the Attorney General, for the United States.

The Executive Order of August 23, 1917, applied to sales for which the defendants were indicted.

Evidence offered to prove that the gross margin fixed by the Executive Order would not allow the defendants any profit was properly excluded.

The indictments were sufficient. The President had power to fix prices without the aid or coöperation of the Federal Trade Commission. The allegations of the indictments are definite and certain.

The Executive Order was not a taking of property without due process of law in violation of the Fifth Amendment. It was valid, regardless of whether the defendants could conduct their business profitably thereunder. Congress, in the exercise of the war power, may control and regulate or may prohibit and destroy the business of trading in coal.

If it be necessary that the jobber's margin be a profitable one, nevertheless the ascertainment of that fact by judicial process is not essential to due process of law.

The Lever Act and the Executive Order did not take the defendants' property.

The Lever Act did not delegate legislative or judicial power in violation of the Constitution.

The Lever Act was not an abuse of the congressional power to provide for the national security and defense, nor was it an invasion of the reserved powers of the State.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

The petitioners were found guilty of violating the President's order of August 23, 1917, by receiving margins above those prescribed for coal jobbers. Both causes present the same fundamental questions and one opinion will suffice.

The Lever Act, "An Act To provide further for the national security and defense by encouraging the production,

conserving the supply, and controlling the distribution of food products and fuel," approved August 10, 1917, c. 53, 40 Stat. 276, 284, 286, provides—

"Sec. 25. That the President of the United States shall be, and he is hereby, authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by-producer or dealer, to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign; said authority and power may be exercised by him in each case through the agency of the Federal Trade Commission during the war or for such part of said time as in his judgment may be necessary. . . .

"Whoever shall, with knowledge that the prices of any such commodity have been fixed as herein provided, ask, demand, or receive a higher price, or whoever shall, with knowledge that the regulations have been prescribed as herein provided, violate or refuse to conform to any of the same, shall, upon conviction, be punished by fine of not more than \$5,000, or by imprisonment for not more than two years, or both. Each independent transaction shall constitute a separate offense."

"Sec. 26. That any person carrying on or employed in commerce among the several States, or with foreign nations, or with or in the Territories or other possessions of the United States in any article suitable for human food, fuel, or other necessities of life, who, either in his individual capacity or as an officer, agent, or employee of a corporation or member of a partnership carrying on or employed in such trade, shall store, acquire, or hold, or who shall destroy or make away with any such article for the purpose of limiting the supply thereof to the public or affecting the market price thereof in such commerce, whether

temporarily or otherwise, shall be deemed guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than two years, or both." . . .

On August 21, 1917, after prescribing a schedule of prices for bituminous coal at the mine, the President said: "It is provisional only. It is subject to reconsideration when the whole method of administering the fuel supplies of the country shall have been satisfactorily organized and put into operation. Subsequent measures will have as their object a fair and equitable control of the distribution of the supply and of the prices not only at the mines but also in the hands of the middlemen and the retailers."

August 23, 1917, pending further investigation and determination, it was ordered by the President—"a coal jobber is defined as a person (or other agency) who purchases and resells coal to coal dealers or to consumers without physically handling it on, over, or through his own vehicle, dock, trestle, or yard. For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of 15 cents per ton of 2000 pounds, nor shall the combined gross margins of any number of jobbers who buy and sell a given shipment or shipments of bituminous coal exceed 15 cents per ton of 2000 pounds."

September 6, 1917, the Fuel Administrator directed, that "contracts relating to bituminous coal made before the proclamation of the President on August 21, and contracts relating to anthracite coal made before the President's proclamation of August 23, are not affected by these proclamations, provided the contracts are *bona fide* in character and are enforceable at law." [On August 23 the President issued an order fixing prices for anthracite coal at the mines, effective September 1st.]

A statement and order by the Fuel Administrator, dated September 7, 1917, contained the following paragraphs.

"A very large proportion of the coal supply available for the coming winter is under contract. These contracts, which are allowed to stand for the present, were made prior to the President's proclamation and very largely limit the amount which may be placed on sale at retail prices based on the President's order.

"It is absolutely essential, however, that a sufficient amount of coal be put on the market at once at these prices to meet the needs of domestic consumers. The Fuel Administration believes that this supply of coal can be made available and will be made available by voluntary arrangement between the operators and those with whom they have contracts, and thus make it unnecessary for the Fuel Administration to exercise or recommend the exercise of the powers provided in the Lever Act."

On October 6, 1917, the Fuel Administrator further directed—

"Coal may be bought and sold at prices lower than those prescribed by the orders of the President.

"The effect of the President's orders on coal rolling when the order affecting such coal was issued is to be decided by first ascertaining whether or not the title had passed from the operator to the consignee at the time the President's order became effective. If the title had passed to the consignee, the price fixed by the President does not apply. . . .

"A jobber who had already contracted to buy coal at the time of the President's order fixing the price of such coal, and who was at that time already under contract to sell the same, may fill his contracts to sell at the price named therein.

"A jobber who, at the time of the President's order fixing the price of the coal in question at the mine, had contracted to buy coal at or below the President's price, and at that time had no contract to sell such coal, shall not sell the same at a price higher than the purchase price plus

the proper jobber's commission as determined by the President's regulation of August 23, 1917.

"A jobber who, at the time of the President's order fixing the price of the coal in question, was under contract to deliver such coal at a price higher than a price represented by the price fixed by the President or the Fuel Administrator for such coal plus a proper jobber's commission as determined by the President's regulation of August 23, 1917, shall not fill such contract at a price in excess of the President's price plus the proper jobber's commission, with coal purchased after the President's order became effective and not contracted for prior thereto.

"A jobber who, at the date of the President's order fixing the price of the coal in question, held a contract for the purchase of coal without having already sold such coal, shall not sell such coal at more than the price fixed by the President or the Fuel Administrator for the sale of such coal after the date of such order, plus the jobber's commission as fixed by the President's regulation of August 23, 1917."

The Fuel Administrator issued many other orders, not presently important.

The petitioning corporation, Matthew Addy Company, acting by petitioner Ford, the Vice President, did business as coal jobber at Cincinnati, Ohio. By contract dated July 31, 1917, it purchased many carloads of coal from Bluefield Coal and Coke Company, at \$3.25 per ton f. o. b. the mines in West Virginia. With knowledge of jobbers' margins fixed by the President's order of August 23, 1917, it sold sundry lots of this coal during August and September, 1917, at \$3.50 per ton f. o. b. the mines, without having contracted so to do before that order issued. Do these circumstances suffice to establish the offense charged? We think not; and, accordingly, the judgments below must be reversed.

The order must be construed as criminal statutes are—strictly and without retroactive effect unless clearly indi-

cated. *Chew Heong v. United States*, 112 U. S. 536, 559; *Shwab v. Doyle*, 258 U. S. 529, 534. If it be construed as applying to the sales of coal purchased by petitioners prior to August 23rd, we must decide a grave constitutional question, not necessary to consider if another view be accepted. Under the existing circumstances, did Congress have power to fix prices at which persons then owning coal must sell thereafter, if they sold at all, without providing compensation for losses? If this difficulty can be eliminated by some reasonable construction of the order, it should be accepted. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 407, 408.

The above quoted statements and orders show plainly enough that in August, 1917, a very large part of the available coal supply was under contract. This greatly limited the amount which "may be placed on sale at retail prices based on the President's order," as pointed out on September 7th. Nevertheless, the contracts were "allowed to stand for the present." Evidently the purpose was to begin the administration of the fuel supplies by regulating subsequent transactions without striking down all existing *bona fide* contracts which might affect such supplies. If, prior to August 23rd, petitioners had agreed to sell coal purchased in July, such contracts would not have been within the order. October 6th more sweeping rules were promulgated; one of them has direct relation to circumstances like those here presented.

The order treated buying and selling as integral parts of the regulated transaction and made no reference to expenses incident thereto. If it applied only to transactions thereafter begun, all had opportunity to govern themselves accordingly; but, if given retroactive effect, jobbers who had negotiated purchases at costs exceeding fifteen cents per ton would necessarily lose if they sold, although they had acted in entire good faith. Certainly, there was no purpose to encourage hoarding, contrary to

the Lever Act, § 26, or to retard movement of fuel to the ultimate consumers by making sales unprofitable. No imperative reason appears for treating jobbers who had bought but had not contracted to sell with less consideration than was accorded those with agreements for sales, irrespective of the stipulated price.

Considering the ordinary rules of interpretation and the circumstances disclosed, we conclude that the order of August 23rd did not apply to the sales in question. It was not retroactive, and the sales were but part of a transaction begun before its date. We are not unmindful of the forceful argument to the contrary; and we consciously refrain from indicating any opinion respecting the validity of the order as interpreted.

The judgments of the court below are reversed and the causes will be remanded to the District Court for further proceedings in harmony with this opinion.

Reversed.